

1961

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Fosta s/o Kipija Mwakalinga v R

[1961] 1 EA 1 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam

Date of judgment: 22 February 1961

Case Number: 733/1960

Before: Sir Ralph Windham CJ

[1] Criminal law – Breach of the peace – Threat of violence – Whether mere threat of violence constitutes breach of peace – Penal Code, s. 89 (2) (b) (T.).

Editor’s Summary

The appellant, with a spear in his hand, went to the house of K the complainant, and from a distance of about two yards called to him “K, come outside”, and “I will stab you”. The appellant was charged and

convicted under s. 89 (2) (b) of the Penal Code, which renders any person guilty of a misdemeanour who “with intent to alarm any person discharges a fire-arm or commits any other breach of the peace”. On appeal the court considered what constitutes a “breach of the peace” so as to satisfy s. 89 (2) (b) of the Penal Code.

Held – the actions and words of the appellant amounted to an “assault in the sense of a threatened battery”; an assault of this nature in the sense of a threat immediately to inflict unlawful force upon another person, accompanied by such actions, or uttered in such circumstances, as to induce, and to be intended to induce, that other person to expect that the threat will be carried out, and thereby to put him in bodily fear, is a breach of the peace.

Appeal dismissed.

No cases referred to in judgment

Judgment

Sir Ralph Windham CJ: The appellant was convicted under s. 89 (2) (b) of the Penal Code, which renders any person guilty of a misdemeanour who:

“with intent to alarm any person discharges a fire-arm or commits any other breach of the peace”.

The particulars of the charge were that the appellant:

“at about 5.15 a.m. at the house of Kurumani Mwakiyambile at Nkuyu village . . . with intent to alarm the said Kurumani Mwakiyambile did commit a breach of the peace, to wit, threatened Kurumani with violence if he failed to move from Nkuyu village”.

The evidence of the complainant, which was corroborated by that of his daughter, both of whom the court believed, was that, while the complainant was inside his house, the appellant came up outside his front door, holding a spear in his right hand, and from a distance of about two yards said to him: “Kurumani, come outside”, and “I will stab you”. According to the daughter, the appellant said:

“Kurumani, if you come out I will kill you, so you will follow my father who is already dead.”

The complainant, frightened by this threat and seeing the spear in the appellant’s hand, and having no doubt that he intended to carry out his threat by reason of recent tribal fighting in the village, in which he and the appellant were in opposite camps, ran out of the back door and reported the incident to the police.

The only question that arises on this appeal, a question which has quite properly been raised by learned Crown Counsel, is whether what the appellant did constituted a “breach of the peace” so as to satisfy s. 89 (2) (b), having in mind the fact that the appellant committed no violence but merely threatened it. Upon careful consideration, I think that the appellant’s actions and words did, in the surrounding circumstances, constitute a breach of the peace. There is comparatively little decided authority defining what exactly is meant by that expression, although there is authority that it is not every threat, even if loudly uttered, that constitutes a breach of the peace. But the following short passage in Glanville Williams Criminal Law (1953), at pp. 560-561 does, I think, correctly set out the position in so far as it touches the facts in the present case. He says:

“There is lack of an authoritative definition of what constitutes a breach of the peace. A battery is clearly a breach of the peace, and so is an assault in the sense of a threatened battery. A prize-fight is a breach of the peace even though the parties consent. Each of these instances involves some danger to the person, and it is submitted that this is the meaning of a breach of the peace for the present purpose.”

The actions and words of the appellant in the present case undoubtedly amounted, in my view, to an “assault in the sense of a threatened battery”. His words alone might not have amounted to an assault in this sense. But, they were accompanied by the presence of a spear in his right hand, and by his knowledge that the complainant well knew that the threat was or might be a genuine one, arising out of the village feud. An assault of this nature in the sense of a threat immediately to inflict unlawful force upon another person, accompanied by such actions, or uttered in such circumstances, as to induce, and to be intended to induce, that other person to expect that the threat will be carried out, and thereby to put him in bodily fear, is to my mind a breach of the peace. Undoubtedly it is so where, as in the present case, the threat is to kill and is uttered at close quarters by one who has in his hand the immediate means to kill, in the form of a lethal weapon.

For these reasons I think that the learned magistrate was justified in convicting the appellant of the offence charged, and this appeal must be dismissed. And in view of the background of tribal fighting against which the offence is to be viewed, and of the other circumstances mentioned by the trial magistrate in passing sentence, I do not think that the sentence of eight months’ imprisonment which he imposed can be considered as manifestly excessive. The sentence will stand.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

MGK Konstam (Crown Counsel, Tanganyika)

For the respondent:
The Attorney-General, Tanganyika

Ngeti s/o Mwaghnia v R
[1961] 1 EA 3 (CAD)

Division: Court of Appeal at Dar-Es-Salaam
Date of judgment: 25 February 1961
Case Number: 218/1960
Before: Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA
Appeal from: H.M. High Court of Tanganyika—Williams, Ag. J

[1] Criminal law – Evidence – Deposition – Reference in judgment to deposition – Deposition of witness called at preliminary enquiry – Witness not called at trial – Deposition not put in evidence – Evidential value of deposition – Criminal Procedure Code, s. 151, s. 194, s. 219, s. 275 and s. 276 (T.).

Editor's Summary

The appeal of the appellant who had been convicted of murder was dismissed as there was no merit in the appeal but the appellate court commented on a reference by the trial judge in his judgment to matter appearing in the deposition of a witness who had given evidence at the preliminary inquiry but who was not called at the trial.

Held –

- (i) depositions are not evidence at a trial unless they have been put in evidence; even then a deposition is not evidence of the truth of its contents unless authorised by law to be so used in the absence of the witness who gave evidence, but is only valuable to destroy the credit of a witness and make the value of his evidence negligible.
- (ii) a trial should be conducted upon evidence before the trial court and if reference is made to matter which is not before the court, whether it be in favour of the accused or prosecution, injustice is likely to result as there has been no opportunity for explanation or for the testing of the matter by cross-examination.

Appeal dismissed.

Cases referred to:

- (1) *Anwarali Rajabali Shivji v. R.*, [1959] E.A. 892 (C.A.).
- (2) *R. v. Golder*, [1960] 1 W.L.R. 1169; [1960] 3 All E.R. 457.
- (3) *R. v. Ziyaya* (1936), 3 E.A.C.A. 31.

Judgment

The following judgment prepared by **Sir Alastair Forbes V-P:** was read by direction of the court.

This was an appeal from a conviction of murder and sentence of death in the High Court of Tanganyika. We were satisfied that there was no merit in the appeal, which we accordingly dismissed. Crown Counsel, however, invited us to comment on the fact that the learned trial judge had, in the course of his judgment, made reference to matter appearing in the deposition of a witness who had given evidence at the preliminary inquiry but who was not called at the trial.

We have already had occasion to comment on a practice, alleged to exist in Tanganyika, of regarding depositions taken at a preliminary inquiry as being automatically in evidence at the trial. In *Anwarali Rajabali Shivji v. R.* (1) (1959), E.A. 892 (C.A.) at p. 898 this court said:

“There is a further point which requires brief mention. It is obvious from the judgment and the record of the proceedings, that free use was made during the trial, of the depositions taken at the preliminary inquiry. Some passages from his deposition were put to Pepe in cross-examination and

were admitted by him. This is of course correct procedure, and no further proof is required of the passages so admitted. Two questions were put to Elias concerning what he had said at the preliminary inquiry; in the first case he denied saying the words which had been put to him and in the second he could not remember if he had said them. If it was desired to challenge his evidence the depositions should have been then tendered and admitted for the purpose of contradicting the witness under s. 145 and s. 155 of the Indian Evidence Act. Neither deposition was put in and indeed there was no basis shown in the case of Pepe, who admitted what was put to him. Elias's deposition was treated by the learned judge as being in evidence and counsel for the appellant proposed to found arguments upon comparisons of both depositions with the evidence given in the High Court.

"In *R. v. Mashimba bin Shipemba* (1938), 5 E.A.C.A. 139 it was said as part of the judgment of the court:

'There are two matters we should like to refer to: one is that where counsel for the defence attacks the prosecution case by drawing attention to such discrepancies as we have referred to, he should have the depositions put in as evidence.'

"In *R. v. Ziyaya* (1936), 3 E.A.C.A. 31 in the judgment of the court at p. 32 is the following:

'The appellant's counsel did not attempt to put in the deposition in contradiction of the witness' evidence and the learned trial judge does not appear to have referred to the discrepancies. In the appellant's written arguments, we are requested to take the discrepancies into consideration and we now have to decide whether in the absence of formal proof of them in the court below it is proper to accede to the appellant's request.'

"The court considered that the case had unusual features and said:

'We are therefore of the opinion that if we permit the failure of the defence to comply with what is nothing more than the mere formality of proving a deposition to stand in the way of our comparing the two portions of the record in question, we may sanction a miscarriage of justice.'

"*R. v. Ziyaya* was followed on this point in *R. v. Wilbald* (1948), 15 E.A.C.A. 111. In *R. v. Magoti* (1953), 20 E.A.C.A. 232 it was held that it is better practice for defending counsel to put the deposition in evidence immediately after the witness concerned has given evidence, so that it can be read to the judge and assessors while the impugned evidence is fresh in their minds. In the same report, at pp. 233-234 is the following passage:

'We would further observe that it was unnecessary to call the clerk from the magistrate's court to prove the deposition. The original depositions are transferred to the High Court under s. 236 of the Criminal Procedure Code and form part of the record in the High Court. They are signed by the committing magistrate under s. 219 (4) as well as by the witness and may generally be put in evidence without further proof (s. 80 Indian Evidence Act). It is only in the rare case where some objection is made to the signatures or to the accuracy of the record that further proof is required.'

"This passage relates of course to the method of proving a deposition as evidence and does not in any way indicate that it is not necessary to put a deposition in at all. We call attention to this only as we were informed

from the bar that there was a practice in Tanganyika of regarding depositions as being automatically in evidence. If there is such a practice it is one for which we see no justification in law.”

We would reiterate that depositions are not evidence at a trial unless they have been put in evidence; and even then a deposition is not evidence of the truth of its contents (unless authorised by law to be so used in the absence of the witness who gave the evidence, e.g. under s. 275 and s. 276 of the Criminal Procedure Code) but is only valuable to destroy the credit of a witness and render his evidence given at the trial negligible. In *R. v. Golder* (2), [1960] 1 W.L.R. 1169 at p. 1172 Lord Parker, CJ, said:

“In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act.”

It is true that in the instant case the learned judge’s reference to the depositions was made in the interests of the accused person. But a trial is to be conducted upon the evidence given before the trial court. If reference is made to matter which is not before the court, whether it be in favour of the accused or the prosecution, injustice is likely to result as there has been no opportunity for explanation or for the testing of the matter by cross-examination. It is true that in exceptional cases such as *R. v. Ziyaya* (3) (1936), 3 E.A.C.A. 31 this court has looked at a deposition which was not put in evidence in order to avoid a possible miscarriage of justice. It is to be noted that in *Ziyaya* (3), the witness in question had been cross-examined upon his deposition, but that defence counsel had failed formally to put the deposition in evidence to contradict the witness and render his evidence negligible. In the circumstances this court would not allow the oversight of defence counsel to result in a miscarriage of justice. But this is a very different matter from a trial court having regard to matters which are not properly in evidence before it. A trial judge will normally have seen the depositions. If he considers that a witness should be examined as to previous contradictory statements appearing in the deposition, and counsel has omitted to cross-examine on the matter, the learned judge may either invite counsel’s attention to the deposition, or himself question the witness upon it and, if necessary, cause it to be put in evidence. He is not entitled simply to pass the deposition over in silence during the course of the trial and then use it as a basis for his decision. Similarly, if the judge regards as essential a witness not called by either side at the trial he has power to call such witness under s. 151 of the Criminal Procedure Code. But he is not entitled to have regard to what that witness may have said before another tribunal.

Our attention in the instant case was also drawn to adverse comment which the learned trial judge made upon comments recorded on the depositions by the magistrate on the demeanour of witnesses who gave evidence at the preliminary inquiry. While it is true that such comments by a magistrate would appear to be authorised by s. 194 of the Criminal Procedure Code, we doubt whether that section was intended to apply to depositions taken at a preliminary inquiry in view of the detailed provision contained in s. 219 of the Code. In any case we agree with the learned trial judge that the better practice is for a magistrate taking depositions to refrain from recording comments on the demeanour of the witnesses.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

MGK Konstam (Crown Counsel, Tanganyika)

For the respondent:
The Attorney-General, Tanganyika

Kantilal Jivraj and another v R
[1961] 1 EA 6 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 17 March 1961
Case Number: 202/1060
Before: Sir Alastair Forbes V-P, Gould JA and Sir Owen Corrie Ag JA
Appeal from: H.M. Supreme Court of Kenya–Sir Ronald Sinclair, C.J., and Rudd, J

[1] Criminal law – Charge – Receiving stolen property– Recent possession of stolen property – Accused charged with receiving – Evidence consistent with theft or receiving – Whether accused should be charged with theft and alternatively receiving – Whether court must consider evidence pointing to each offence – Penal Code, s. 317 (1) (K.) – Criminal Procedure Code, s. 169 and s. 187 (K.) – Indian Evidence Act, 1872, s. 114.

Editor's Summary

The appellants were convicted by a magistrate of receiving stolen property. Their appeals to the Supreme Court were dismissed. In support of a further appeal the principal arguments advanced were that the magistrate misdirected himself in failing to consider whether, on the evidence before him, the appellants could have been guilty of theft, and that, if so, the appellants could not be convicted of receiving stolen property.

Held –

- (i) where the evidence is as consistent with theft as with receiving, and rests on the fact of recent possession of stolen property, the charge or information should include charges both in respect of stealing and receiving.
- (ii) the failure by the magistrate to consider the aspect of theft amounted to a misdirection but the misdirection had occasioned no failure of justice.
- (iii) the evidence was overwhelmingly in favour of receiving and had the magistrate properly directed himself he would have reached the conclusion that the appellants were guilty of receiving and not of stealing.

Appeal dismissed.

Cases referred to:

- (1) *Director of Public Prosecutions v. Neiser*, [1958] 3 W.L.R. 757; [1958] 3 All E.R. 662.
- (2) *R. v. Seymour*, [1954] 1 All E.R. 1006.
- (3) *R. v. Hassani s/o Mohamed* (1948), 15 E.A.C.A. 121.

Judgment

Sir Alastair Forbes V-P: read the following judgment of the court: The appellants, and one Jantilal Jivraj, were jointly charged in the resident magistrate's court at Kisumu with receiving stolen property, namely two pieces of rayon suiting material and two pieces of canvas material, the property of Kisumu Elgon Stores, contrary to s. 317 (1) of the Penal Code, and, in the alternative, with retaining the same property contrary to the same section. Jantilal Jivraj was acquitted on both counts, but the appellants were convicted on the first count, that is, of receiving the property in question knowing, or having reason to believe, it to have been stolen. The appellants appealed to the Supreme Court and their appeals were dismissed. They have now appealed to this court.

Two grounds of appeal were set out in the memorandum of appeal to this court. At the hearing of the appeal, however, Mr. O'Brien Kelly, who appeared

for the appellants, intimated that he wished to abandon these grounds and sought leave to argue five further grounds of which notice had been given to the respondent. Crown Counsel who appeared for the respondent did not object to the new grounds of appeal being argued nor did he make any point of the fact that these new grounds of appeal raised questions which had not been raised in either the resident magistrate's court or the Supreme Court.

The point raised in the new grounds of appeal is, in effect, that the learned resident magistrate misdirected himself in that he failed to consider whether, on the evidence before him, the appellants could have been guilty of the theft of the articles in question; that if the appellants were guilty of the theft they could not be convicted of being the receivers of the property; and that they were thus prejudiced by the learned magistrate's failure to consider whether, on the evidence, they should have been held to have been guilty of the theft, in which case they must have been acquitted of the charge actually laid against them.

Mr. O'Brien Kelly argued that the failure of the learned magistrate to state and decide this question in his judgment was a non-compliance with s. 169 of the Criminal Procedure Code; that it was impossible to say that had the magistrate properly directed himself he could not have reached the conclusion that the appellants were guilty of the theft; and that therefore this appeal ought to be allowed.

It is, of course, well established, and the learned resident magistrate properly directed himself, that a court may presume that a man in possession of stolen goods soon after the theft is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession. (Illustration (a) to s. 114 of the Indian Evidence Act.) This is an inference of fact which:

“may be drawn as a matter of common sense from other facts including, in particular, the fact that the accused has in his possession property which it is proved has been unlawfully obtained shortly before he was found to be in possession of it”

(*Director of Public Prosecutions v. Neiser* (1), [1958] 3 W.L.R. 757 at p. 766). It is merely an application of the ordinary rule relating to circumstantial evidence that the inculpatory facts against an accused must be incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt. According to the particular circumstances it is open to a court or jury to hold that unexplained possession of recently stolen articles is incompatible with innocence. But guilt in this context may be guilt either of stealing or of receiving the articles in question.

In *R. v. Seymour* (2), [1954] 1 All E.R. 1006, the prisoner had been charged and convicted of receiving property knowing it to have been stolen. On appeal the conviction was quashed by the Court of Criminal Appeal. The headnote to the report of the case reads:

“Where there is no positive evidence that a prisoner has stolen property, but is found in possession of property shortly after it has been stolen, and the evidence is as consistent with larceny as with receiving, the indictment should contain a count for larceny and a count for receiving. The jury should then be directed that it is for them to determine whether the prisoner was the thief or whether he was a receiver, and they should be reminded that a man cannot receive from himself. If they find a verdict of guilty on one count, they should be discharged from giving a verdict on the other count.”

Lord Goddard C.J., in the course of the judgment of the court, said, at p. 1007:

“In the present case, for some reason which I do not understand, the indictment charged the appellant with receiving only. The evidence was that on November 7 or 8, 1953, a Belgian folding gun was stolen from a hut on an allotment. The next thing known about that gun was that a few days afterwards it was in the possession of the appellant—within such a time after the theft that the doctrine of recent possession could be applied. Counsel on his behalf put forward the case that the gun of which he had possession was not the gun stolen. The jury rejected that. The evidence was overwhelming that it was the gun which had been stolen and that he had made away with it before he was arrested. He was in possession of this gun a few days after the stealing, and, therefore, said counsel: ‘You may come to the conclusion that he was the thief, and, if he was, you cannot find him guilty on this indictment which charges him only with receiving.’ In my opinion, the right verdict would have been one of larceny.”

It is to be noted that the court there expressed the opinion that the proper verdict on the evidence in that case would have been guilty of larceny. The judgment continues:

“The court desires to lay this down. In cases where the evidence is as consistent with larceny as with receiving, the indictment ought to contain a count for larceny and a count for receiving. The jury should then be directed that it is for them to come to the conclusion whether the prisoner was the thief or whether he received the property from the thief, and should be reminded that a man cannot receive from himself. Then, to prevent other difficulties which have sometimes arisen, if the jury come to the conclusion that it is a case of receiving, they should be discharged from giving a verdict on the larceny count. Equally, if they come to the conclusion that it is larceny, they should be discharged from giving a verdict on the receiving count. Sometimes this court has had to quash a conviction because there has been a conviction of receiving, and the court has come to the conclusion that the evidence showed larceny and not receiving. If a verdict of Not Guilty has been returned on the larceny count, the court cannot substitute under s. 5 (2) of the Criminal Appeal Act, 1907, a verdict of guilty of larceny for a verdict of guilty of receiving, but, if the jury are discharged from giving a verdict on the larceny count and the court considers that the proper verdict is larceny and not receiving, they can substitute that verdict. In the present case we cannot alter the verdict from receiving to larceny because there was no charge of larceny in the indictment. If, therefore, this question which has come before this court, not only in *Loughlin’s* case ((1951) 35 Cr. App. Rep. 69) but in *R. v. Christ*, [1951] 2 All E.R. 254, arises, I hope attention will be called to this matter. It is much better to put into indictments both counts, although, as the case develops, it becomes only either a case of larceny or one of receiving.”

We respectfully agree, and think that it is advisable in any case which rests on the fact of recent possession of stolen property that charges both in respect of stealing as well as of receiving, should be included in the charge or information. It may be noted that under s. 187 of the Criminal Procedure Code a person charged with stealing may be convicted of receiving.

In the instant case, it is true that the learned resident magistrate did not specifically direct himself that he should consider whether the evidence was as consistent with stealing as with receiving. As already indicated, he correctly directed himself that on a finding that an accused person was in possession of property recently stolen, in the absence of any explanation to account for the possession, a presumption of fact might be drawn that he was either the thief or a receiver. He does not, however, deal with the question whether, in this

case, the appellants might have stolen the goods, but, after discussing the evidence, merely says:

“I find that the presumption of fact must prevail and that the two accused persons received the property, knowing or having reason to believe the same to have been feloniously stolen”.

No doubt the learned magistrate’s omission to consider the theft aspect of the matter was due to the fact that the appellants had not been charged with the theft of the goods. Nevertheless, we think that the failure to consider that aspect did amount to a misdirection. We must accordingly consider whether any miscarriage of justice has ensued. In this regard we think the material matter for consideration is whether in fact the evidence was “as consistent with larceny as with receiving”. While the inference which may be drawn from the unexplained possession of property recently stolen is guilt beyond reasonable doubt of stealing or receiving, the inference as to which is appropriate in a particular case must depend on the probabilities of the case based on such indications as can be found in the evidence. In *R. v. Seymour* (2) the court expressed the opinion that on the evidence in that case the right verdict would have been one of larceny. The court, however, indicated the type of factor which would indicate the probability of receiving rather than stealing. Lord Goddard said at p. 1006:

“It is necessary, in cases of receiving, that the jury should have it explained that they must be satisfied that the prisoner received the property from somebody else. Very likely one cannot say who the other person was because one does not know the thief. For instance, supposing stolen property is found in the possession of a shopkeeper who deals in that particular property, the jury are entitled to say: ‘He did not steal the property himself, but we think he is a “fence”’, but there are a great many cases where I do not think anybody who applies his mind to the case can have any doubt that the person found in possession of the property is the thief.”

In *Director of Public Prosecutions v. Neiser* (1) at p. 767, the Court of Criminal Appeal said:

“The right inference from recent possession may be that the accused himself has stolen the property, as where he is found in the street near the scene of the house-breaking in possession of the property which has been taken from the house which has been entered. On the other hand, where property has been stolen and there is nothing in the circumstances to point to the accused’s having himself committed the crime of stealing, the proper inference from its being found in his possession may be that he received the property knowing, not merely that it had been unlawfully obtained, but knowing that it had been stolen.”

This court in *R. v. Hassani s/o Mohamed* (3) (1948), 15 E.A.C.A. 121 at p. 122 said:

“On that finding [i.e. the possession of property recently stolen] in the absence of any explanation by the appellant to account for his possession a presumption does arise that the appellant was either the thief or a receiver. In the circumstances of this case it was no easy matter for the learned trial judge to say which, because there was really no pointer in either direction. We appreciate that this is a difficulty in which judges and magistrates often find themselves so it may be as well to repeat which has been said before that ‘it is a presumption of fact, and not an implication of law, from evidence of recent possession of stolen property unaccounted for, whether

the offence of stealing or of feloniously receiving, has been committed', *Rex v. Langmead*, IX, Cox Criminal Cases, 464. Whenever the circumstances are such as to render it more likely that the party found in possession did not steal it the presumption is that he received it. Everything must depend on the circumstances of each case. Factors such as the nature of the property stolen, whether it be of a kind that readily passes from hand to hand, and the trade or occupation to which the accused person belongs can all be taken into account. A shopkeeper dealing in second-hand goods of the kind involved would naturally suggest receiving rather than stealing. In the present case the stolen property was a wrist watch of some value, easily identifiable, and therefore an article which a thief might experience some difficulty in disposing of by sale. There was nothing to suggest that he was the receiver or the kind of person who might be accustomed to receive stolen property."

What is the relevant evidence in the instant case? The stolen goods which were found in the appellants' possession had been stolen from Kisumu Elgon Stores on the night of June 22/23, 1960. Those goods were a part only of the total goods stolen from Kisumu Elgon Stores on that night. The evidence was that clothing materials, rayon material, canvas and other things to a value of Shs. 6,500/- had been stolen. The goods were found in the shop kept by the appellants at Luanda. Luanda is a matter of twenty-two miles from Kisumu where the theft took place. Of the goods stolen only those mentioned in the charge were found on the appellants' premises. The business carried on by the appellants at their shop at Luanda included the sale of materials. A witness stated:

"I know that Arjan Kara's shop at Kisumu [i.e. the premises from which the articles mentioned in the charge had been stolen] was broken and entered. Some of the offenders have been caught; some have not yet been apprehended."

Mr. O'Brien Kelly contended that this evidence was mere hearsay, but we see no reason to regard it as such. It was a statement made by a sergeant of the Criminal Investigation Department of the police at Kisumu who was concerned in investigating the breaking and entering of the premises on the occasion when the goods in question were stolen. It is to be supposed that he would have personal knowledge of the fact that any of the principal offenders had been caught. Finally, there was no evidence whatever to connect the appellants with the offence of breaking and entering Arjan Kara's shop in Kisumu.

Upon this evidence we think that the only possible conclusion is that the appellants were receivers and not the thieves. This, in our view, is not a case where the "evidence is as consistent with larceny as with receiving". We think the evidence is overwhelmingly in favour of receiving, and that, had the learned magistrate properly directed himself he must have reached the conclusion that the appellants were guilty of receiving and not of stealing. Had the appellants been charged in the alternative with stealing the articles in question and had they been convicted of that offence, we think that, on appeal, the court must have substituted a conviction of receiving.

In these circumstances, we hold that the misdirection complained of has occasioned no failure of justice, and we therefore dismiss the appeals.

Appeal dismissed.

For the appellants:

JO' Brien Kelly

For the respondent:

JR Hobbs (Crown Counsel, Kenya)

For the appellants:

Advocates: *SR Kapila & Kapila*, Nairobi

For the respondent:

The Attorney-General, Kenya

Victoria Industries Ltd v Ramanbhai & Brothers Ltd
[1961] 1 EA 11 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	29 March 1961
Case Number:	107/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA
Appeal from:	H.M. High Court of Tanganyika–Jeffries, Ag. J

[1] Contract – Frustration – Sale of goods – Goods available – Delivery to buyer impracticable – Refusal of railway to transport – No practicable alternative means of transport – Whether contract frustrated – Indian Contract Act, 1872.

Editor's Summary

The appellant company, which carried on business in Mwanza, Tanganyika, agreed to buy from the respondent company which carried on business in Uganda, 200 tons of Mengo maize. The contract provided that the price was “F.O.R. Kampala or Jinja Station” and that payment was to be made in full by sight draft against documents and that if all or part of the maize was railed from Jinja and the freight from there to Mwanza exceeded the freight from Kampala to Mwanza, the excess freight was to be for the sellers’ account. The obvious route for transport of the maize was by rail to Port Bell, Uganda, and thence by lake steamer to Mwanza. The respondent company commenced loading maize at Jinja, but was then obliged to unload as the railway stopped accepting maize and maize flour for Tanganyika via Lake Victoria. During the stoppage a little maize was transported by lake steamer to Mwanza on a quota basis but later the Uganda Government prohibited the export of maize to Tanganyika. The respondent company accordingly informed the appellant of the position and offered delivery at Jinja or alternatively suggested that the contract should be cancelled. After some correspondence, the respondent company purported to cancel the contract and the appellant company then sued for damages for breach of contract. The trial judge dismissed the suit, holding that the railway’s refusal to accept the maize made it impossible for the respondent company to book it F.O.R. Kampala or Jinja, and that the contract had been frustrated. On appeal it was submitted that there was nothing to show that the respondent company could not have purchased the documents of title to maize in transit and so would have been able to perform the contract; that therefore it had not been proved that performance of the contract was impossible; alternatively that impossibility of performance had not been proved while there were alternative routes available.

Held –

- (i) there was no practicable alternative route available for the transport of the maize to Mwanza.

- (ii) it was most improbable that out of any small consignments sent to Tanganyika during the material period the respondent company would have been able to secure for resale to the appellant company 200 tons of maize which complied with the requirements of the contract.
- (iii) it was sufficiently established that the respondent company could not have performed the contract by the purchase of way-bills of consignments of maize already in transit.

Appeal dismissed.

Cases referred to:

- (1) *Shirlaw v. Southern Foundries (1926) Ltd.*, [1939] 2 K.B. 206.
- (2) *Albert D. Gaon & Co. v. Societe Inter-professionnelle des Oleagineux Fluides Alimentaires*, [1959] 2 All E.R. 693.
- (3) *Tsakiroglou & Co. Ltd. v. Noblee and Thorl, G.m.b.H.*, [1960] 2 All E.R. 160.
- (4) *Carapanayoti & Co. Ltd. v. E. T. Green Ltd.*, [1958] 3 All E.R. 115.

March 29. The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes V-P: This is an appeal from a judgment and decree of the High Court of Tanganyika dismissing with costs a claim by the appellant company for Shs. 22,400/- as damages for breach of contract, together with interest and the costs of the suit.

The appellant company is a limited liability company carrying on business at Mwanza in Tanganyika, where it deals in produce, including maize, and also owns flour mills. The respondent company is a limited liability company carrying on business in Uganda and dealing primarily in maize and maize flour. Through the offices of a firm of brokers the parties entered into a forward contract for the supply by the respondent company to the appellant company of 200 tons of maize. The contract was drawn up and signed on behalf of both parties on August 14, 1957, by a Mr. Trivedi of the firm of brokers. It was accepted by the learned judge that the respondent company actually got its copy of the contract on August 20, 1957. The material part of this contract is as follows:

“Contract Note No. 35757

Seller: Messrs. Ramanbhai and Brothers, Jinja.

Buyers: Messrs. Victoria Industries Limited, Mwanza.

Commodity: (Two hundred) tons of 2,240 lb. net each.

Quality: Current season crop. Maize guaranteed to be of Mengo district of Buganda Province.

Booking: August/September, 1957.

Price: Shs. 19/- (Shs. nineteen) per bag of 203 lb. gross F.O.R. Kampala and/or Jinja station.

Packing: In first-grade second-hand gunny bags, sound, clean and fit for export. Bags to be double sewn at mouth.

Payment: 100 per cent. against necessary documents by sight draft.

Special Condition: In case parcel or part of the parcel is railed from Jinja and if railage between Jinja and Mwanza is more than what would have been from Kampala to Mwanza, the difference resulting in additional freight will be at sellers' account.”

The obvious route for the transport of the maize from Jinja or Kampala to Mwanza was by rail to Port Bell in Uganda, and thence by lake steamer across Lake Victoria to Mwanza. The lake steamers were owned and operated by the East African Railways and Harbours Administration as part of the railway, and transport by rail and lake steamer was treated as transport by rail. The freight payable in respect of maize sent from Kampala to Mwanza by this route was about Shs. 2/85 per bag. It is to be noted that the

contract provided that if the maize was railed from Jinja, any additional freight above the cost of railage from Kampala was to be borne by the sellers, the respondent company. Otherwise the freight was to be paid by the buyers.

Other possible routes by which maize could be transported from Jinja or Kampala to Mwanza were: (a) by rail to Kisumu via Nakuru and thence by lake steamer to Mwanza; (b) by rail to Mombasa, thence by sea to Dar-es-Salaam, and on by rail to Mwanza; and (c) by road.

On receipt of its copy of the contract the respondent company commenced loading maize at Jinja, but was then obliged to unload on instructions from the chief goods clerk at Jinja Station. These instructions were given in pursuance of instructions he himself had received from the district traffic superintendent telling him to stop acceptance of maize and maize flour for Tanganyika via Lake Victoria until further notice. This prohibition continued until October 16, 1957, when the Uganda Government imposed a prohibition on the export of maize to Tanganyika.

Mr. Dunlop, assistant traffic superintendent at Kampala, who gave evidence, stated that the reason for the stoppage was lack of capacity to cope with the amount of maize offering for transport to Tanganyika. He said:

“There was suddenly on offer a large amount of maize for Tanganyika. The lake capacity was being operated to cover the standard main stream of traffic.

“Additional capacity was not available for that particular part of the lake.”

He also explained that the stoppage was not an absolute stoppage, but that some maize was transported to Mwanza as capacity became available; that the available capacity was very limited; that out of 7,000 or 8,000 tons of maize on offer the railway had moved some 2,000 tons up to the time when export was stopped on October 16; that the available capacity was allocated on a quota system; and that the respondent company, which had 700 tons of maize and 100 tons of maize meal on offer for transport, was allowed space up to October 16, for two lots of 25 tons each, and one of 20 tons.

In these circumstances the respondent company informed the appellant company of the difficulty, offered delivery of the maize at Jinja, and in the alternative suggested that the contract should be cancelled. After some correspondence the respondent company purported to cancel the contract. The appellant company then instituted the suit claiming damages based on the difference between the contract price plus freight, and the price which the appellant company had to pay for maize to take the place of that which was not delivered under the contract. The learned judge held that the contract had been frustrated, saying that he was satisfied that the railways’ refusal to accept the maize made it impossible for the respondent company to book it F.O.R. Kampala or Jinja in August or September. He accordingly dismissed the suit with costs.

At the hearing of the appeal it was common ground that there was no material difference between the English law and the Indian Contract Act as regards the doctrine of frustration, so far as this case was concerned.

Mr. O’Donovan, who appeared for the appellant company, argued that it was for the respondent company to establish impossibility of performance; that this was a forward contract for the supply of unascertained goods, and that it did not differ materially from a C.I.F. contract; that the contract was to be performed by delivery of documents of title; that such documents would be the railway way-bill; that Mr. Dunlop’s evidence showed the shipment of 2,000 tons of maize to Mwanza during the material period; that there was nothing to show that the respondent company could not have purchased the documents of title of maize in transit and so been able to perform the contract, that it therefore had not been proved that performance of the contract became impossible, and, accordingly, the respondent company had not discharged the onus that was upon it.

In the alternative, Mr. O'Donovan argued that impossibility had not been proved while there were alternative routes available.

So far as the latter argument is concerned, I do not think there is any substance in it. Mr. O'Donovan conceded that transport by road was not a practicable alternative, so it is not necessary to consider that route. As regards transport by Mombasa and Dar-es-Salaam, Mr. Wilkinson, for the respondent company, demonstrated that the additional freight involved would have resulted in the cost of the maize to the appellant company being greater than the price it actually paid for substitute supplies. Transport by Mombasa and Dar-es-Salaam would have involved consignment of the maize by sea, as well as by rail, a matter obviously not contemplated by the contract. This appears to me to be a fundamental difference between the two routes. Applying the test of the "officious bystander" suggested by MacKinnon, L.J., in *Shirlaw v. Southern Foundries (1926) Ltd. (1)*, [1939] 2 K.B. 206 at p. 227, I have no doubt that the parties would have said "Of course the contract is to be on the basis of transport by lake steamer".

This would not, of course, exclude the route via Nakuru and Kisumu. As to this, the learned judge appears to have accepted that had efforts been made to transport the maize by this route the embargo would have been extended to that route also. He says:

"So far as the route by rail to Kisumu and then by lake to Mwanza is concerned Mr. Dunlop has said that if it had been attempted to send the maize that way he would not have accepted it without referring the matter to the railways district officer at Kisumu and that he was sure that he would have refused to accept it. This was because the difficulty facing the E.A.R. & H. was a shortage of lighters and had traffic been offered to cross the lake by an alternative route the embargo would have been transferred."

Mr. O'Donovan argued that Mr. Dunlop's evidence on the point was hearsay, and that there was no evidence to support a finding that the Kisumu route could not have been used.

I do not think that this is so. Mr. Dunlop said, *inter alia*:

"There was no restriction on moving maize to Kisumu port. There is a railway link to Kisumu from Jinja via Nakuru. The difference by going that route would be about twice the rate per bag. It was not suggested that it should be done that way, there was no traffic to take that crop.

"Q. If somebody had said take it that way would you have refused?

"A. I would have contacted the district officer, Kisumu" (this, I think, should read "District traffic superintendent, Kisumu") "to see if he could handle it and I am sure the answer would have been no.

"Had it been offered to cross the lake at an alternative route the embargo would have been transferred. I used to speak to the district traffic superintendent, Kisumu, daily. . . ."

Later, in answer to the court, Mr. Dunlop, said:

"The distribution of the rest of the fleet was to cover the traffic flow which was from Kisumu to Mwanza and Bukoba. It was not convenient to move vessels to Port Bell to deal with the maize as they were fully committed to standard traffic over the period . . ."

I think it is clear that Mr. Dunlop was speaking of his own knowledge and saying that the available capacity on the lake, whether at Port Bell or Kisumu, was fully committed and that the extraordinary traffic in maize at the material

time could not have been handled from either port. Mr. Dunlop's evidence on the point is uncontradicted and, in my opinion, establishes that the Kisumu route was not available for the transport of the maize. Mr. O'Donovan referred to *Albert D. Gaon & Co. v. Societe Interprofessionnelle des Oleagineux Fluides Alimentaires* (2), [1959] 2 All E.R. 693, and *Tsakiroglou & Co. Ltd. v. Noble and Thorl, G.m.b.H.* (3), [1960] 2 All E.R. 160, but in the view I have taken I do not think it necessary to refer to them in detail. I am of opinion that there was not a practicable alternative route available for the transport of the contract goods.

I return to Mr. O'Donovan's principal argument, that the respondent company had not shown that it could not have performed the contract by the purchase of maize already in transit. Mr. O'Donovan referred to the following passages in the judgment of McNair, J., in *Carapanayoti & Co. Ltd. v. E. T. Green, Ltd.* (4), [1958] 3 All E.R. 115 at p. 117:

"The sellers could not, after the closing of the canal on Nov. 2nd, have purchased afloat on c.i.f. Belfast terms one hundred tons of the contract goods shipped from Port Sudan to Belfast in October or November, 1956, via the Suez Canal . . .

.....

"In this concise statement of the seller's obligations I have omitted the qualification that the seller can perform this obligation by procuring or buying on the market a bill or bills of lading issued to shippers other than himself, provided that the bill or bills of lading comply with the contract since, as stated above, it is found by the case that the sellers could not, after the closure of the canal, have purchased afloat on c.i.f. Belfast terms one hundred tons of the contract goods shipped from Port Sudan to Belfast in October or November, 1956, via the Suez Canal."

As I have already indicated, Mr. O'Donovan argued that there was no material difference between the contract in the instant case and a c.i.f. contract, and that it had not been shown that the respondent company could not have bought on the market a way-bill in respect of maize in transit and performed its contract by delivery of such way-bill to the appellant company.

This argument has, as was stressed by Mr. Wilkinson, been advanced for the first time at the hearing of the appeal. It was not raised in the issues agreed at the trial which were as follows:

- (1) Was there an implied condition that E.A.R. & H. would be able to rail the goods in August/September, 1957?
- (2) If so, were E.A.R. & H. unable so to rail them?
- (3) Are the facts set out in para. 5 of the plaint the case?
- (4) Was the defendant aware of any and if so which of the matters set out in para. 5 of the plaint?
- (5) To what relief are the parties entitled?

Nor was it suggested as a possibility either in cross-examination of the respondent company's witnesses or in the argument of counsel for the appellant company. In these circumstances I think this court can take into account the inherent improbability of such a course being open to the respondent company in the circumstances which prevailed at the time. It is clear from the evidence that there was a scramble, if it may be so described, by the merchants, some twenty in number according to Mr. Dunlop, for available transport space, and that this was controlled by a quota system. The respondent company was trying to secure space for 700 tons of maize and 100 tons of maize flour, and was allocated two lots of 25 tons each and one lot of 20 tons, the former

not being allocated till October. Bearing in mind that the total amount of maize offering for transport to Mwanza was 7,000–8,000 tons, and that there were some twenty odd firms of merchants endeavouring to obtain space, I think it is a reasonable inference that no one merchant was allowed to consign more than a very limited quantity, i.e. in the nature of 25 tons, at any one time. These quantities would be likely to be consigned, as was the case with the quotas made available to the respondent company, to specific consignees in pursuance of existing contracts. It seems most improbable that out of small consignments so sent during the material period, i.e. August 20 to September 30, the respondent would have been able to find available a total of 200 tons, complying with the requirements specified in the contract, which it could acquire for resale to the appellant company. It appears to me that in the circumstances the failure to suggest the possibility of such purchase at the trial amounts to a concession that the possibility did not exist. Indeed, there appears to be an express concession to this effect by Mulji Thakerji, the managing director of the appellant company, in the course of his evidence when he said in cross-examination:

“Q. When you bought maize elsewhere why not Mengo maize?

“A. None was offered. It depends on the broker. I don’t know the Mengo District. I had a sample. I know it came from Mengo District.

“Q. You made no attempt to get any more from Mengo District?

“A. I knew nobody there I asked the broker and he said I have no other goods. I asked the broker for maize from anywhere I did not specify Mengo.

“Q. Not when you discovered that the price was higher than Mengo?

“A. I had no connection whatever with anyone. I asked the broker he said ‘I have no other goods to sell’.”

This appears to me to amount to evidence from the managing director of the appellant company itself that Uganda, and, in particular, Mengo, maize was not available for purchase, in transit or otherwise.

It is true the learned judge did not deal with this point, but, as the argument was not put forward to him, he could hardly be expected to do so. It seems to have been accepted at the trial that the possibility was so remote that it could be ignored. Such evidence as there is supports this view. I would hold that it is sufficiently established that the respondent company could not have performed the contract by purchase of way-bills of consignments of maize already in transit.

For the reasons I have given I think the appeal must fail. I would dismiss it with costs.

Sir Kenneth O’Connor P: I agree with the judgment of the learned vice-president. The appeal will be dismissed with costs.

Gould JA: I also agree.

Appeal dismissed.

For the appellant company:

BO’Donovan QC and KL Jhaveri

For the respondent company:

PJ Wilkinson QC and SH Rajani

For the appellant company:

Advocates: *Laxman & Co*, Mwanza

For the respondent company:
Wilkinson & Hunt, Kampala

Shillemy Yahooda v GA Paul and another
[1961] 1 EA 17 (CAA)

Division: Court of Appeal at Aden
Date of ruling: 20 January 1961
Case Number: 92/1960
Before: Sir Kenneth O'Connor P, Gould and Crawshaw JJA
Appeal from: H.M. Supreme Court of Aden–Campbell, C.J

[1] Rent restriction – Possession – Monthly sub-tenancy – Sub-tenant becoming ill takes in partner – Business conducted solely by partner – Partnership alleged to be a sham – Whether landlord entitled to possession – Rent Restriction Ordinance (Cap. 136), s. 11 (2) (g) and (d) (A.) – Partnership Ordinance (Cap. 109), s. 4 (1) and s. 6 (1) (A.) – Contract Ordinance, s. 25 (A.).

Editor's Summary

The appellant was the tenant of shop premises in Aden. The first respondent, a tailor, was sub-tenant of part of the premises on a monthly basis. The first respondent became ill and went to India leaving his wife and children in Aden. His wife tried to sell the business and to get key-money for a sub-tenancy. Having failed to get what she thought sufficient, she entered into an arrangement with the second respondent which was evidenced by a document alleged to be a partnership agreement under which the second respondent was to come in, provide working capital and carry on the business and be responsible for all losses, while the first respondent was to draw a fixed sum of Shs. 18,000/– per annum as his share of the profits. The appellant instituted proceedings claiming *inter alia* possession of the premises for his own use and occupation and ejectment of the first respondent, alleging that the alleged partnership agreement was a mere sham designed to defeat the appellant's rights as landlord under s. 11 (2) (g) of the Rent Restriction Ordinance. The trial judge dismissed the suit and held that although the partnership agreement was drawn in an unusual form, it created a partnership; that the first respondent did not lose possession of the premises by becoming merely a sleeping partner and it was impossible to say that he had no animus revertendi to Aden. On appeal it was argued that the object of the partnership agreement was fraudulently to prevent the landlord from exercising his rights under the Rent Restriction Ordinance; that this was an unlawful object and therefore the partnership agreement was void under s. 25 of the Contract Ordinance.

Held –

- (i) the facts relied on by the appellant fell far short of proving that the relation of partnership, ostensibly created by the partnership agreement, was not intended to, and did not in fact, exist.
- (ii) there was evidence to show that the second respondent was carrying on the business, acting for both partners and that a partnership was intended and existed.

- (iii) one of the objects of the first respondent in entering into partnership with the second respondent was to retain his rights to the premises and by entering into a legal partnership the first respondent neither committed fraud on the landlord nor did he act illegally.
- (iv) the evidence adduced in support of appellant's claim for possession of the premises on the ground that he required the premises for his own use and occupation fell far short of the standard required to justify the making of an order under s. 11 (2) (d) of the Rent Restriction Ordinance.

Appeal dismissed.

Cases referred to:

- (1) *Allen v. Allen* [1894] P. 248.
- (2) *Raghunandan v. Hormasji* (1927), A.I.R. Bom. 187.
- (3) *B. C. G. A. Punjab Ltd. v. I. T. Commissioner* (1937), A.I.R. Lah. 338.
- (4) *Aboobaker Noor Mohamed Bokhairia v. Haji Yacoob Haji Ismail*, E.A.C.A. Civil Appeal No. 48 of 1950 (unreported).

January 20. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: The appellant is the tenant of shop premises at Steamer Point, Aden. The first respondent, G. A. Paul, was a subtenant on a monthly basis of part of the premises in which he carried on a tailoring business.

In March or April, 1959, the first respondent became ill and went to India leaving his wife and children in Aden. Mrs. Paul tried to get rid of the business. She tried to get key-money for granting a sub-tenancy. Having failed to get what she thought was sufficient, she entered into an arrangement with the second respondent which is evidenced by a document alleged to be a partnership agreement under which the second respondent was to come in and provide working capital and carry on the business, the profits being allocated as mentioned therein. The appellant in his plaint averred that the first respondent's business and stock in trade had been sold up, that the first respondent had no intention of returning to Aden from India and that the alleged partnership agreement was a mere sham designed to defeat the appellant's rights as landlord under section 11 (2) (g) of the Rent Restriction Ordinance (Cap. 136) and that, in fact, what had occurred was a sub-letting and transfer of possession of the suit premises from the first to the second respondent. The appellant further averred that he required the suit premises for his own use and occupation. He asked for a decree for possession of the suit premises and ejectment of the first respondent, an injunction restraining the second respondent from trespassing on the suit premises, damages and costs.

The hearing commenced on February 4, 1960, when issues were framed and evidence was heard. After the plaintiff's (appellant's) witnesses had been heard Mrs. Paul, wife of the first defendant (first respondent) gave evidence: She was cross-examined by counsel for the second defendant; but before any cross-examination by counsel for the plaintiff had taken place, the hearing was adjourned to June 10, 1960. On resumption on that day, learned counsel for the defendants (respondents) asked for an adjournment. The record reads:

"10-5-60

"Gandhi-Bhatt: We ask for an adjournment. Otherwise Mrs. Paul's evidence having not been cross-examined by plaintiff will not be considered by the court.

"Sanghani: I oppose. No supporting affidavit is filed. Medical Certificate is not sufficiently positive. Mrs. Paul's evidence though not cross-examined can still be weighed by court though I say it can have little value.

"Court: I do not think an adjournment should be granted here. The Medical Certificates unsupported by any affidavit are put in at the very last possible moment. They do not categorically state that an air journey by

Mrs. Paul from Bombay to Aden would be dangerous to her health. It seems that Mr. Paul is unlikely ever to come to Aden, as he is, on the evidence, a chronic invalid. His evidence should have been taken on

commission and moreover since I am leaving Aden permanently in two days time the plaintiff would have to call all his evidence again.”

It will be observed that learned counsel for the plaintiff (appellant) in opposing the adjournment said *inter alia*:

“Mrs. Paul’s evidence though not cross-examined can still be weighed by court though I say it can have little value”.

The learned Chief Justice in his judgment dated May 26, 1960 held that the partnership agreement was:

“shadowy in substance and was drawn up to avoid the plaintiff taking advantage of his right to regain possession when a tenant has gone out of or transferred possession”.

He found, however, that notwithstanding that the agreement was drawn in an unusual form and that there were other peculiar circumstances, a partnership was created: the first defendant did not lose possession of the premises by becoming merely a sleeping partner and it was impossible to say that he had no animus revertendi. Accordingly the learned Chief Justice could not find that the plaintiff had gone out of possession or sub-let and he, therefore, dismissed the suit against both defendants.

The plaintiff appealed on grounds set out in her memorandum of appeal filed on the 4th of October. These grounds will be noticed later.

On January 6, 1961, five days before the hearing, a notice for leave to add an additional ground of appeal was filed, unsupported by affidavit. The additional ground sought to be filed was:

“6A. The learned Chief Justice erred in law in considering the evidence of Mrs. S. G. Paul, who had not presented herself for cross-examination.”

The notice was signed by Mr. Sanghani, advocate for the appellant who argued in support of it at the commencement of the hearing. The application was strongly opposed by learned counsel for the respondents. Mr. Gandhi, for the first respondent said that he had been afraid in the lower court that there might be objection to the evidence of Mrs. Paul if she had not been cross-examined and that that was why he had made the application for an adjournment noticed above; but that when Mr. Sanghani, in opposing the application had said that Mrs. Paul’s evidence, though not cross-examined, could be weighed by the court, he had not pressed his application further. Mr. Gandhi submitted that Mr. Sanghani had consented to Mrs. Paul’s evidence being taken into consideration by the court, though Mr. Sanghani had said that her evidence would be of little weight. Mr. Sanghani, supporting his application, argued that he had merely made an error in law in supposing that the evidence could be considered by the court, and he pressed his application.

The general rule is that the evidence of one party cannot be received as evidence against another party unless the latter has had an opportunity of testing it by cross-examination: *Allen v. Allen* (1), [1894] P. 248; Sarkar on Evidence (10th Edn.) at p. 1165 and cases there cited. But it is not necessary to the admissibility of evidence that the witness should have been cross-examined. The party entitled or his counsel may waive his right to cross-examine and may consent to the evidence-in-chief of a witness being admitted and considered without cross-examination. This is what both counsel for the respondents considered that Mr. Sanghani had done and, from the record, we think that (whatever may have been Mr. Sanghani’s undisclosed intention) that was the impression which his words would have given. In the circumstances, we thought that an application to rely now on the very right which he had apparently waived in the court below should not have been made, and we refused the application.

In fact, the learned Chief Justice had not relied on Mrs. Paul's evidence and had said so in his judgment, a certified copy of which had been supplied by the court to the appellant's advocate. It appears that the copy supplied by the court was a correct copy of the judgment of the Chief Justice. By some mischance, however, the relevant paragraph had been omitted (in copying the judgment in the advocate's office) from two out of three of the records supplied for the use of the judges of this court, though in the third record there was (in addition to the defective copy of the judgment) a very faint carbon copy of the complete judgment of the learned Chief Justice. We draw attention to the necessity for advocates satisfying themselves by an adequate check that the records as copied in their offices are in fact true and complete copies of the original documents before they sign a certificate to that effect.

On the merits, Mr. Sanghani argued that there was irresistible evidence that the first respondent and Mrs. Paul were trying to sub-let the suit premises; that the alleged partnership agreement between the respondents was a sham and fraudulent in that it was never intended to create a partnership between the respondents but was a colourable document merely drawn up in fraud of the landlord's rights; that in fact, what had occurred had been a sub-letting or transfer of the suit premises from the first to the second respondent and that the so-called fixed share of profits which the first appellant was to be entitled to draw was merely key-money payable by instalments. In support of these allegations Mr. Sanghani pointed to the following features in the partnership agreement and to the conduct of the parties. He particularly stressed:

- (1) that the first respondent had put in no capital in cash and that the second respondent was required to provide the working capital of the business;
- (2) that the share of profits of the first respondent was to be the fixed sum of Shs. 18,000/- per annum which he was to have the right to draw at the rate of Shs. 1,500/- a month;
- (3) that the second respondent was to have all the profits in excess of Shs. 18,000/- per annum and was to bear all the losses;
- (4) that the second respondent had testified *inter alia* that he did not know whether he was making a profit or a loss; he had bought some of the goods in his own name and that his books of account were of no value in assessing the profits of the partnership and that he had not, up to February 4, 1960 filed a return of income tax for 1959/60.

All these matters were considered by the learned Chief Justice who had the alleged partnership deed before him and heard the witnesses and came to the conclusion that the deed was not void and that misconduct by the second respondent (e.g. in failing to keep the proper books of account provided for by clause 5 of the partnership agreement) did not render the agreement void ab initio.

I think that the learned Chief Justice was right. As the question depends upon construction of a document and the inferences to be drawn from facts admitted or found, an appellate court is in almost as good a position as was the court of trial to determine the issue.

“ ‘Partnership’ is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all”;

Partnership Ordinance (Cap. 109) s. 4 (1). In determining whether a group of persons is or is not a firm, regard is to be had to the real relation of the parties, as shown by all the relevant facts taken together: *ib.* s. 6 (1).

In order to discover the real relation of the parties I will now examine the provisions of the document and the relevant facts and, in particular, those facts set out above on which learned counsel for the

appellant relies to show

that a real relation of partnership did not exist between the first and second respondents:

First, the fact that the first respondent subscribed no capital in cash. The first respondent put into the business the premises in which his own tailoring business had hitherto been carried on and his good-will (if any). This was capital and an important capital asset.

Secondly, the fact that the first respondent's share of profits was fixed. There was an agreement to share the profits of the business. Partners can agree to share profits in any way they like. They may agree that one partner is to receive a fixed annual or monthly sum in lieu of a sum varying with the profits actually earned: *Raghunandan v. Hormasji* (2) (1927), A.I.R. Bom. 187. This is quite a common arrangement and no inference should be drawn from it that the alleged partnership was bogus.

Thirdly, that the second respondent was to bear all the losses. It is not essential to constitute a partnership that the losses should be shared by the partners. It is open to two partners to arrange that one of them shall bear all the losses: *Raghunandan v. Hormasji* (2). The mere circumstance that an arrangement of this kind exists does not militate against the presumption of partnership: *B.C.G.A. Punjab Ltd. v. I.T. Commissioner* (3) (1937), A.I.R. Lah. 338. In the present case, a woman with six children was left in Aden by an invalid husband who had to go suddenly to India. She needed support and it was very natural that she should prefer a fixed income on which she could rely to a fluctuating share of profits. And it was very natural that she should want to guard against liability for losses. She made the kind of agreement that one would expect in the circumstances. These provisions relating to a fixed share of profits and the incidence of losses are neutral and no inference that the agreement was or was not intended to effect a partnership can be drawn from them.

Fourthly, the conduct of the second respondent in failing to keep proper accounts and in buying some goods in his own name. I think that this does tend to show that the second respondent did not intend to account properly to the first respondent; but it is not possible to deduce from this conduct alone that the partnership never existed or was never intended to exist. The second respondent may have been incompetent or dishonest.

In my opinion, the facts relied on by the appellant fall far short of proving that the relation of partnership, ostensibly created by the partnership agreement, was not intended to, and did not in fact, exist.

The essentials of partnership are the agreement to share the profits of a business and the carrying on of the business by all or any of the persons concerned, acting for all: s. 4 Partnership Ordinance; and Pollock & Mulla on The Indian Partnership Act (1st Edn.) at p. 5. One partner may be a sleeping partner, provided that the other carries on the business "acting for" both. The second respondent undoubtedly failed in some of his obligations, but he repeatedly referred in his evidence to "the partnership" which was registered, he agreed that he had to pay Mrs. Paul and that she had a right to inspect his books. Paul would, on the partnership agreement as drawn, have been liable to third parties for the debts of the partnership. I think that there was evidence that the second respondent was carrying on the business acting for both partners and that the learned Chief Justice was justified in finding that a partnership was intended and existed.

I think that the learned Chief Justice was also right in holding that it was impossible to say that the first respondent had no animus revertendi to Aden. I am not persuaded that it was necessary to the creation of a valid partnership that the second respondent should return to Aden personally. He might, in the absence of provisions to the contrary in the agreement, have exercised his rights by an agent. But I

think that, in fact, there was evidence of an intention to return. For instance, the second recital to the partnership agreement mentions

that the first respondent had gone to India “for a vacation” and clause 10 says that during the continuance of the partnership, the rent of the premises was to be paid by the first respondent; and clause 10 provides that on a dissolution, the premises, furniture, fixtures and fittings previously belonging to the first respondent were to be delivered to him. These provisions seem inconsistent with an intention to quit Aden permanently and never to return.

Mr. Sanghani argued that the object of the agreement was to prevent the landlord from exercising his rights under the Rent Restriction Ordinance, that this was an unlawful object and that therefore the agreement was void under s. 25 of the Contract Ordinance. He said that the object of the transaction was fraudulently to deprive the landlord of his rights. I think that this argument is misconceived. No doubt, one object, if not the main object, of the first respondent in entering into partnership with the second respondent was to retain his right to the premises. But that was not a fraud on the landlord. The tenant was entitled, provided that he could do so legally, in his own interests to order his affairs so that he would not become liable to ejectment. He was entitled to maintain his position by entering into a legal partnership and there was nothing unlawful about that. What he would not have been entitled to do was to enter into a bogus agreement of partnership merely as a cloak for the grant of a sub-tenancy or transfer of possession. Upon proof of that, the landlord’s right to eject him might have arisen. The learned Chief Justice, however, found that the partnership agreement in this case was not a sham and that it did effect a partnership and, for the reasons already given, I agree. It follows that I agree also with the refusal of the learned Chief Justice to find that the first respondent had gone out of possession of or sub-let the suit premises.

It is unnecessary, in view of this, to consider Mr. Gandhi’s point (taken for the first time on appeal) that the appellant’s notice to quit was invalid because it was not shown by the appellant that the notice expired with the end of a month of the tenancy. (See *Aboobakar Noor Mohamed Bokhairia v. Haji Yacoob Haji Ismail* (4), E.A.C.A. Civil Appeal No. 48 of 1950) (unreported).

It is, however, necessary to deal with the appellant’s claim, in para. 9A of the plaint, that he required the suit premises for his own use and occupation. What has to be shown in order to bring s. 11 (2) of the Rent Restriction Ordinance into operation is that the premises are reasonably required by a landlord therein mentioned, that the court considers it reasonable to grant an order, and that greater hardship would not be caused by granting than by refusing to grant it. The only evidence which the appellant produced on this point was his statement that his shop was very crowded and that he wanted more room. That fell far short of the standard required to justify the making of an order under s. 11 (2) (d) of the Rent Restriction Ordinance.

I would dismiss the appeal with costs.

Gould JA: I agree and have nothing to add.

Crawshaw JA: I also agree.

Order: The first respondent is to have his costs of the appeal to be taxed and paid by the appellant. The second respondent is to have the costs of and incidental to arguing the additional issue of sub-tenancy raised by him, also to be taxed and paid by the appellant.

Appeal dismissed.

For the appellant:

PK Sanghani

For the first respondent:

KA Husain Gandhi

For the second respondent:

HM Handa

For the appellant:

Advocates: *PK Sanghani*, Aden

For the first respondent:

JM Mody, Aden

For the second respondent:

A Bhatt, Aden

BJ Patel v Rattan Singh
[1961] 1 EA 23 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 February 1961
Case Number:	50/1960
Before:	Sir Alastair Forbes V-P, Sir Owen Corrie Ag JA and Mayers J
Appeal from:	H.M. Supreme Court of Kenya–Connell, J

[1] *Limitation of action – Contract of service – Claim against former employee for balance of account – Set-off pleaded for arrears of salary – Agreement for reasonable salary when service commenced – Subsequent agreement to pay fixed salary – Time from which limitation runs – Limitation Ordinance (Cap. 11), s. 5 (1) (K.) – Indian Contract Act, 1872, s. 2, s. 25 (2) and (3).*

Editor's Summary

The respondent sued the appellant for Shs. 18,569/15, the balance due on a running account between the parties. The appellant did not dispute the items in the account but claimed to set-off Shs. 17,916/60 alleged to be due as salary for work done by him between November, 1948, and December, 1955. The respondent in reply pleaded *inter alia* that the set-off was barred by the Limitation Ordinance so far as the period November 2, 1948, to January 28, 1953. The trial judge accepted the appellant's evidence that when he commenced work in 1948 he was promised that if the business developed he would be paid reasonably and that subsequently, in 1957, there was an oral agreement fixing his salary at Shs. 2,500/– per annum. The defence and counter-claim having been filed on January 21, 1959, the trial judge held that the appellant was entitled to a set-off only in respect of salary earned during the period January 29,

1953, to December 31, 1955, and accordingly gave judgment for the respondent for Shs. 11,868/60. On appeal it was argued *inter alia* that the cause of action only arose on January 15, 1957, when agreement on the rate of salary was reached. This was a new contract and the claim was thus four years within time.

Held –

- (i) on a construction of the wording of s. 2 of the Indian Contract Act, 1872, where a past consideration is a good consideration under para. (d) of the section, the agreement based on such past consideration is made at the time of acceptance of the proposal and not at the date of the performance of the consideration and that the cause of action under that agreement must run from the date thereof.
- (ii) until a definite agreement is concluded, no cause of action on the agreement to pay a specified sum exists, and there is nothing in the Indian Contract Act, 1872, to suggest that the cause of action under such an agreement is to be related back to the date the services were rendered.
- (iii) the agreement for payment of salary to the appellant at the rate of Shs. 2,500/– per annum came into being on January 15, 1957, and that was the date on which the cause of action under that agreement began to run.

Appeal allowed. Set-off allowed at Shs. 16,666/60. Judgment for the respondent for Shs. 1,902/55.

Cases referred to:

- (1) *Sindha v. Abraham* (1896), 20 Bom. 755.
- (2) *Lampleigh v. Brathwait* (1615), 1 Sm. L.C. 148; 80 E.R. 255.

February 1. The following judgments were read:

Judgment

Sir Alastair Forbes V-P: This is an appeal from a judgment and decree of the Supreme Court of Kenya dated January 25, 1960.

The appellant is an Asian, carrying on the business of general merchant and grocer at Molo, and the respondent is an Asian building contractor also carrying on business at Molo. The respondent sued the appellant for Shs. 18,569/15, which was alleged to be the balance due to the respondent on a running account between the parties for the years 1953 to 1957, particulars of which were annexed to the plaint. The appellant did not dispute the items in the account, but claimed to set off a sum of Shs. 17,916/60 which he alleged to be due to him in respect of salary for work done by him over the period November 2, 1948, to December 31, 1955. He paid into the court the difference, namely Shs. 652/55. The plaint was filed on December 4, 1958, and the appellant's "defence and counterclaim", which claimed the set-off, was filed on January 29, 1959. Both the claim and set-off are in respect of transactions between the appellant and a former partnership which existed between the respondent and his brother, one Dharam Singh, but it appears that the respondent was duly authorised for the purposes of this case to sue and be sued in respect of such transactions and no point arises as to this.

In his reply to the "defence and counterclaim", the respondent pleaded *inter alia* that the appellant's claim to a set-off was:

"barred by the Limitation Ordinance (Cap. 11, Laws of Kenya) so far as the same relate to the period November 2, 1948, to January 28, 1953, and therefore unenforceable".

The appellant's claim to a set-off is based on the following allegations:

That the appellant had worked for a former partnership consisting of the respondent and his two brothers as accountant and bookkeeper up to November 1, 1948, when that partnership was dissolved; that the business was continued by a partnership consisting of the respondent and his brother, Dharam Singh, from November 2, 1948; that the appellant at the request of the partners continued to work for this partnership as accountant, bookkeeper and general secretary until December 31, 1955, except for a period of six months in 1953 when one Contino was employed in place of the appellant; that no amount was agreed for wages at the time the appellant's employment commenced in November, 1948, as the firm had only newly started, but that the appellant was told that if the partnership got good work they would fix wages fairly and reasonably; that Dharam Singh went to India in June, 1949, and the appellant was then told by the respondent that wages would be fixed when Dharam Singh returned from India; that Dharam Singh did not return from India till January 5, 1957; that when the appellant pressed for wages in 1953, Contino was taken on instead of him but that after six months the appellant was re-employed, and was paid Shs. 5,000/- on account of wages; that the appellant continued to be told by the respondent that the matter of his salary would be adjusted on the return of Dharam Singh from India; that on January 15, 1957, after the return of Dharam Singh, a discussion took place between the appellant, the respondent and Dharam Singh regarding salary, and that it was then agreed that the appellant should be paid salary for the work he had done at the rate of Shs. 2,500/- per annum.

A payment of Shs. 5,000/- to the appellant on September 23, 1954, is shown in the particulars attached to the plaint, but the learned judge held that the appellant had failed to establish that this was a

payment on account of salary, and held, therefore, that it was, as contended by the respondent, a loan by the respondent to the appellant. Apart from this payment, however, the learned judge accepted the evidence of the appellant and held that there was an oral

agreement made in January, 1957, between the appellant, the respondent and Dharam Singh fixing a salary of Shs. 2,500/- per annum for the work done by the appellant for the respondent and Dharam Singh. On the basis of this finding the learned judge held that the appellant was entitled to a set-off in respect of salary earned during the period January 29, 1953 to December 31, 1955. He said:

“I turn now to the January, 1957, conversation; on this aspect I accept the evidence of Dharam Singh and the defendant; I see no reason not to accept this version. I find there was an oral agreement then fixing a remuneration at Shs. 2,500/- per annum. But what is the effect of that having regard to the Limitation Ordinance? To my mind it is this: I find the defendant worked for the plaintiff by writing up books etc. until the end of 1955 to complete the books. That is the period alleged in the pleadings and he cannot be heard to say that he worked longer. But he must give credit for six months in which Contino was employed in 1954. The set-off was filed on January 29, 1959. Defendant is therefore entitled to a credit during the period he worked from January 29, 1953, until December 31, 1955, less the six months during which Contino was employed. I find that Shs. 2,500/- per annum was the rate agreed.”

The learned judge accordingly gave judgment for the respondent for Shs. 11,868/60, and three-quarters of the respondent's taxed costs of his suit. The appellant now appeals against this decision.

Several grounds of appeal are set out in the memorandum of appeal, but I only propose to deal with one of these as I am of the opinion that the decision on this ground concludes the matter. As to the other grounds of appeal, I would merely mention, first, that the learned judge's finding that the payment of Shs. 5,000/- to the appellant in 1954 was not in respect of salary was challenged, but that this was a finding of fact with which I should hesitate to interfere; and secondly, that I am inclined to the view that there is substance in the first ground of appeal, which is that the respondent's plea of limitation was bad:

“for failure to designate and aver the specific sections or sub-sections of the Limitation Ordinance relied upon as required by s. 40 thereof”,

but that, had it been necessary to decide it and I had reached this conclusion, I would, in the circumstances of this case, have been disposed to allow an amendment of the pleadings, even at this stage, to enable the specific section of the Ordinance to be expressly pleaded.

The ground of appeal upon which I think the appellant must succeed is that the cause of action only arose when the agreement as to the rate of salary was made on January 15, 1957. It is clear that a submission to this effect was made at the trial as the learned judge says in the course of his judgment:

“Alternatively he [i.e. counsel for the appellant] argues the cause of action only arose when salary was fixed and there was a new contract, i.e. in January, 1957: therefore he submits, there being in effect a new contract in January, 1957, to pay Shs. 2,500/- per annum, the claim is four years within time as the set-off was filed on January 29, 1959.”

However, the learned judge did not deal with this contention except in so far as it is implicit in the passage set out earlier in this judgment that he rejected it when he said:

“The set-off was filed on January 29, 1959. Defendant is therefore entitled to credit during the period he worked from January 29, 1953, until December 31, 1955 . . .”

The relevant provision of the Limitation Ordinance (Cap. 11) is sub-s. (1) of s. 5, which reads as follows:

“All suits for the recovery of any chattel or movable thing, or the possession thereof, all suits founded upon any simple contract and all personal suits whatsoever shall and may, unless otherwise specifically provided for in this Ordinance, be commenced and sued within six years next after the cause of such suits and not after.”

The material question therefore is when the cause of action in respect of salary at the rate of Shs. 2,500/– per annum arose. It is clear that, on the learned judge’s findings, a contract had existed since November, 1948, for the payment to the appellant of salary at a reasonable rate; and that a claim under this contract in respect of wages for the period November, 1948, to January, 1953, would have been barred by limitation; assuming, that is, though it was disputed, that the material date for calculation of the period of limitation, if it applied, was the date of filing of the “defence and counterclaim”. Section 2 of the Indian Contract Act, 1872 (which applies in Kenya), however, provides, *inter alia* as follows:

- “2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:
- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:
 - (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise; . . .
.....
 - (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise:
.....
 - (e) Every promise and every set of promises, forming the consideration for each other, is an agreement.
.....
 - (h) An agreement enforceable by law is a contract:
.....”

Upon a construction of the wording of these provisions it seems plain that where a past consideration is a good consideration under para. (d) of the section, the agreement based upon such past consideration is made at the time of the making of the proposal and its acceptance, and not at the date of the performance of the consideration; and that the cause of action under that agreement must run from the date of the agreement. The decisions of Indian Courts on the Contract Act appear to support this view. In *Sindha v. Abraham* (1) (1896), 20 Bom. 755, which is cited in Pollock & Mulla, Indian Contract and Specific Relief Acts, (8th Edn.) at p. 26, farran, C.J., said:

“The point argued before us for the appellant is that there was no legal consideration for the agreement sued on. By it the defendant promises to give the plaintiff an allowance of Rs. 125 a year, because during the whole of the five years’ litigation, which went on between his father and himself, and in which his legitimacy was questioned, plaintiff rendered him

great assistance and remained with him in times of distress. It was thus distinctly an agreement to compensate for past services. These services were rendered to the defendant at first while he was a minor, and were subsequently continued after he had attained his majority. . . . They were intended to be recompensed, though the nature and extent of the proposed recompense were not fixed until the agreement now sued on was executed by the defendant. . . .

.....

“Mr. Inverarity, for the appellant, cited Pollock on Contracts, p. 169 (5th Edn.), as expressing the law founded upon decisions in the English courts which ought to govern us in the present case, but we are unable to accept that contention. The Contract Act, though in the main founded on English case law, does not follow, as pointed out by Mr. Cunningham in his work on the Act, the present English law on the subject of consideration. We must turn to the Act itself. If the services of the plaintiff were rendered at the desire of the defendant, expressed during the defendant’s infancy and continued at the same request after his majority, we do not doubt that they form a good consideration for the defendant’s subsequent express promise to pay the annuity secured by the agreement. Services at the desire of the promisor already rendered and such services to be rendered are placed in s. 2 (d) upon the same footing. Either will constitute a good consideration for a definite agreement.”

I think it follows that until the “definite agreement” is concluded, no cause of action on the agreement to pay a specified sum exists, and there is nothing in the Contract Act to suggest that the cause of action under such an agreement is to be related back to the date the services were rendered. It may be that an earlier contract to remunerate at a reasonable rate existed, but that contract would be displaced by the contract to pay at a specified rate and the latter could only take effect from the date when the rate was agreed. In the instant case the consideration was the doing by the appellant at the desire of the respondent of the work of bookkeeper, accountant and general secretary over the period November 2, 1948, to December 31, 1955. This consideration is clearly good consideration within para. (d) of s. 2 of the Contract Act. The proposal that the appellant be paid in respect of this work at the rate of Shs. 2,500/- per annum was only made and accepted on January 15, 1957. In my opinion the agreement for the payment of salary to the appellant at that rate only came into being on January 15, 1957, and that date must be the date on which the cause of action under that agreement began to run. That agreement no doubt displaced the earlier agreement for the payment of wages at a reasonable rate, but in my opinion it could only take effect from the date on which it was entered into, and did not relate back to the date of the earlier contract.

I reach my conclusion upon the plain words of s. 2 of the Contract Act. Some argument was addressed to us on the law in England, based on the case of *Lampleigh v. Brathwait* (2) (1615), 1 Sm. L.C. 148, but for the reasons expressed by farren, C.J., in *Sindha v. Abraham* (1), I do not think the English decisions apply. We are bound by the terms of the Contract Act itself.

Mr. Long, for the respondent, argued that the appropriate section of the Contract Act to which regard should be had, was s. 25 (3). Mention was also made by Mr. Khanna, for the appellant, of sub-s. (2) of s. 25 of the Contract Act. Section 25 provides, *inter alia*:

“25. An agreement made without consideration is void, unless:

.....

- (2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless
- (3) it is a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

“In any of these cases, such an agreement is a contract.”

On the findings of fact of the learned judge, this case clearly does not fall within sub-s. (2); and, as regards sub-s. (3), this was not a promise to pay a debt of which the appellant might have enforced payment but for the law of limitation. No debt based on a salary at the agreed rate could exist until the rate was agreed. No doubt the appellant might have enforced payment of salary at a reasonable rate for the period in question but for the law of limitation, but that would have been in relation to a contract entered into in 1948. The agreement in January, 1957, was a new contract entered into for good consideration, and was not a mere acknowledgment of or promise to pay an existing debt.

For the reasons I have given I think the appeal should be allowed with costs and the judgment and decree of the Supreme Court set aside. It was not contested that the appellant's original claim to a set-off must be reduced by Shs. 1,250/- in respect of the period during which the learned judge held that Contino was employed. The set-off to be allowed would therefore amount to Shs. 16,666/60. I would therefore order that judgment be entered for the respondent in the sum of Shs. 1,902/55. As regards costs in the Supreme Court, the respondent's claim in the plaint was admitted in the “defence and counterclaim”, and the whole action turned on the appellant's claim to a set-off in respect of salary. As to this, the appellant succeeds entirely except for a sum of Shs. 1,250/- which, while it was included in the sum claimed as a set-off in the “defence and counterclaim”, was conceded by the appellant when giving evidence. In the circumstances I would order that the appellant pay the respondent's costs up to the date of the filing of the “defence and counterclaim”, and that the respondent pay the appellant's costs subsequent to such date.

Sir Owen Corrie JA: I agree and have nothing to add.

Mayers JA: I also agree.

Appeal allowed. Set-off allowed at Shs. 16,666/60. Judgment for the respondent for Shs. 1,902/55.

For the appellant:

DN Khanna

For the respondent:

LE Long

For the appellant:

Advocates: *DN & RN Khanna*, Nairobi

For the respondent:

Lawrence Long & Todd, Nakuru

Gopaldas Chhagan Siraj v Luke Thomas & Co Limited
[1961] 1 EA 29 (CAA)

Division: Court of Appeal at Aden
Date of judgment: 21 February 1961
Case Number: 62/1960
Before: Sir Kenneth O'Connor P, Gould and Crawshaw JJA
Appeal from: H.M. Supreme Court of Aden–Campbell, C.J

[1] Sale of goods – Rejection – Contract amended after signature – Goods shipped before contract amended – Documents in accordance with original contract – Objections by purchaser to documents – Whether rejection of goods justifiable – Sale of Goods Ordinance, s. 52 (2) (A.) – Eastern African Court of Appeal Rules, 1954, r. 68 (2).

Editor's Summary

On January 27, 1958, the appellant agreed to purchase from the respondents five hundred tons of sugar which the appellant subsequently refused to accept. By the contract the sugar was to be bagged in jute bags, to be loaded at the end of January or early in February and the c.i.f. price was to be paid by letter of credit to be opened immediately in favour of the respondents' London agents, M. Golodetz. On January 28, an irrevocable letter of credit was opened by the appellant with the Bank of India which required that the drafts of M. Golodetz were to be accompanied by an invoice, bill of lading, insurance policy, certificate of Polish origin and "certificate from Polcargo in respect of quality, weight, polarisation, packing, etc.". On about February 6, the parties also agreed that the bags should be new and, the appellant alleged, that the bags should also be sound. When the bank received the documents they informed the appellant that they contained discrepancies, one of which was that the certificate of quality did not state that the bags were sound. The appellant told the bank he would accept the documents if, *inter alia*, an amended Polcargo certificate was supplied that the goods were packed in single new and sound jute bags. The bank replied to the appellant that M. Golodetz refused to accept the conditions as unjustified. The respondents then called on the appellant to accept the documents and the appellant again proposed conditions which were not accepted. The respondents subsequently sued and obtained judgment against the appellant for breach of contract and damages. On appeal counsel for the appellant submitted that the letter of credit was part of the contract and was binding on the respondents, that since the Polcargo certificate was to include "packing" the respondents were under a duty to supply a further certificate to include this term, and that since the bill of lading did not include the word "sound" the appellant was justified in refusing to accept the goods.

Held –

- (i) (per Crawshaw, J.A., Sir Kenneth O'Connor, P., concurring) it was sufficient that the set of documents as a whole should between them contain the whole particulars provided each document contained such particulars as were necessary to make that document valid; if a Polcargo certificate

was required under the contract it was not intended that it should certify the soundness of the bags and the term was sufficiently covered by its inclusion in the invoice;

- (ii) the appellant was not justified in repudiating the agreement because the Polcargos certificate did not include a reference to “sound” bags;
- (iii) (per Gould, J.A.) since the amendment of the contract to include the word “sound” was made on about February 6, the surrounding circumstances must be considered and, since the parties must have been aware that it would

most probably be impossible to insert the word “sound” in the Polcargos certificate, they must have intended that it would suffice if the shipping documents as a set showed that the bags were sound; one would not ascribe to the parties an intention to agree to a requirement which they knew or must be deemed to have known was most probably impossible of fulfilment.

Appeal dismissed.

Cases referred to:

- (1) *Midland Bank Ltd. v. Seymour* (1955), 2 Lloyd's Rep. 147.
- (2) *Eastern Bank Ltd. v. Jamnadas Sakerchand*, [1959] E.A. 147 (C.A.).

February 21. The following judgments were read by direction of the court:

Judgment

Crawshaw JA: This is an appeal against the judgment of the learned Chief Justice, Aden, awarding damages to the respondent/plaintiff for breach of contract by the appellant/defendant in failing to take delivery of five hundred tons of sugar sold to him by the respondent.

The written contract between the parties was made on January 27, 1958, the price being c.i.f. Aden. It provided that the sugar was to be bagged “in jute bags” and was to be carried by a ship “due to load the end of January or early February, 1958”. Payment was to be effected by:

“letter of credit for full c.i.f. value to be opened telegraphically by buyers immediately on signing the contract favouring Messrs. M. Golodetz, Sugar Brokers, 29 Mincing Lane, London, E.C.3 (England), valid February 22, 1958”.

On January 28, an irrevocable letter of credit was established by the appellant with the Bank of India Limited in favour of Messrs. M. Golodetz through whom the shipping was being arranged by the respondent. The letter of credit required that the drafts of Messrs. M. Golodetz were to be accompanied by an invoice, bill of lading, insurance policy or certificate, certificate of Polish origin and:

“certificate from Polcargos in respect of quality, weight, polarisation, packing, etc.”.

A few days later, it would seem, an amendment was made to the contract to the effect that the jute bags should be “new” ones. The appellant pleaded that a further amendment was subsequently made (from the evidence this would probably have been on February 6), that the bags should also be “sound”. Approval of this last amendment was denied by the respondent, and the learned Chief Justice said,

“In my view the defendant has failed to discharge the onus of proof that the plaintiffs agreed to the amendment”.

This matter was of importance, for on the strength of the alleged amendment to the contract, the appellant amended likewise his letter of credit to include the term “sound”.

The loading of the sugar was, according to the Polcargos certificate, duly completed at Gdynia by February 2, and it arrived in Aden on March 8. On February 19, the Bank of India Limited wrote informing the appellant that the documents presented to the bank by Messrs. M. Golodetz contained certain discrepancies, the one relevant to these proceedings being that the:

“certificate of quality, weight, etc., does not state that the bags are sound”;

this certificate was the Polcargos certificate issued at Gdynia on February 3, which described the “packing” as “single new jute bags a hundred net kilos each”. On February 21 the appellant wrote to the bank that he was prepared to accept the documents subject to certain conditions, one of which was:

“That the amended certificate of quality, weight, etc. from Polcargos is supplied to the effect that the goods are ‘Packed in single new and sound jute bags’ ”.

The bank replied on March 1, that they had been informed that the drawers refused to accept the appellant’s conditions of payment, as being unjustified. In the meanwhile the respondent had received information from Messrs. M. Golodetz that the documents had been refused, and on February 26, wrote to the appellant calling upon him to accept them. On February 28, the appellant replied that he would consider doing so on certain conditions, but these were not agreed to by the respondent. Although correspondence continued thereafter between the parties and their advocates, no settlement was arrived at. The parties agreed that February 28, should be taken as the date of repudiation of the contract by the appellants.

Mr. Nunn, for the respondent, has, on the hearing of this appeal, and in spite of the finding of the learned Chief Justice, conceded that the respondent must have agreed the additional term of the contract that the bags should be “sound”. He submits, however, that there was no agreement that this term should be included in all, or any specified, shipping documents. He further submits that it was not a part of the contract that the Polcargos certificate should be supplied, and that this requirement was wrongly inserted by the appellant in his letter of credit.

Mr. Mansoor submits that the letter of credit is part of the contract and that the respondent is bound by its contents. The letter of credit was, however, merely the contractual method of payment, and if the authority of the bank to pay was limited therein by terms not provided for or implied in the contract, and non-payment resulted, the appellant would be in breach of the contract. As I see it, when a c.i.f. contract does not mention the documents to be handed over to the purchaser, the documents would be the usual shipping documents, and the purchaser opening the letter of credit should not stipulate others; in the present case no documents were mentioned in the contract. In *Scrutton on Charter Parties and Bills of Lading* (14th Edn.), p. 204, it is said in reference to c.i.f. contracts,

“The term ‘shipping documents’ in such a contract of sale ordinarily means (i) a bill of lading, (ii) a policy of insurance, (iii) an invoice”.

There is no direct evidence that the respondent had seen the letter of credit or had otherwise been informed of the appellant’s requirement therein for a Polcargos certificate, although of course Messrs. M. Golodetz knew of it and presumably it was they who obtained the certificate. Even supposing it could be said that the respondent was under a binding obligation to supply a Polcargos certificate (and, as I say, there was no evidence of this), could the appellant rightly reject the one which was offered to them? Mr. Mansoor argues that the respondent was not only bound to supply a Polcargos certificate, but one which certified that the bags were not only new but sound. The learned Chief Justice did not come to a finding whether a Polcargos certificate was a necessary document, but in my opinion the appellant’s rejection of the certificate was anyway unjustified. In view of his finding that the word “sound” was not a part of the contract, the learned Chief Justice observed that it was not necessary for him to decide whether had it been, its omission in the certificate would have entitled the appellant to reject the sugar. This was however a matter which was pleaded

in the written statement and which comes within the first issue, “Does the defendant prove that he was entitled to reject the goods?”, and we are now asked to decide it.

If it is assumed for the sake of argument that it was understood to be part of the contract that a certificate would be supplied, it is not of course contested by the appellant that at the time the certificate was issued the only condition as to the quality of the bags was that they should be “new jute bags” and it was as such that they were certified in the Polcargo certificate. It was not until the sugar had been despatched that the condition as to soundness was agreed upon. Mr. Mansoor argues, and this is his first main ground of appeal, that as the certificate was to include “packing”, the respondent thereupon came under a duty to supply a further or amended certificate to include this term. Presumably a Polcargo certificate is only issued in respect of conditions at the time of loading, as in the present case. The appellant himself said in evidence “it is done at time of shipment”, although he did later say:

“even after the goods are, shipped it is possible to change the Polcargo certificate”.

There is no evidence how, when once the goods are shipped (let alone when they are at sea as they would appear to have been at the relevant time in the present case) examination of the bags for soundness could have been effected, and without examination I do not see how they could have been so certified. The appellant can hardly say, nor has he, that having found the bags to be “new” Polcargo would be in a position to certify them also as “sound”, and it is clear that the appellant does not regard the two terms as synonymous. The only reasonable view one can come to is, I think, that when the term “sound” was agreed to be added it was then too late to obtain a Polcargo certificate to include that term, and that this must have been fully realised by the parties at the time. It would be wrong in my opinion to read more into the intention of the parties than that the new term became a condition of the contract; there is no implication in the circumstances that this condition should form a part of the Polcargo certificate. To my mind there can be no doubt that the appellant was wrong to repudiate the agreement on the ground that the respondent failed to provide a Polcargo certificate certifying the bags to be “sound”.

Mr. Mansoor has further argued, presumably under ground 5 of the memorandum of appeal, which in general terms complains that the learned Chief Justice was wrong in holding that the appellant was not entitled to refuse acceptance, that the word “sound” should have appeared in the bill of lading also. I understand him to maintain that its absence from that document was alone sufficient to justify the appellant in refusing to accept the shipping documents. There is no evidence that it was part of the agreement that all or any particular one of the documents should contain this term, nor was it pleaded, although no doubt it was a term which the appellant was entitled to find in the shipping documents as a whole. The position seems to be covered by the case *Midland Bank Ltd. v. Seymour* (1) (1955), 2 Lloyd's Rep. 147, cited with approval by this court in the *Eastern Bank Ltd. v. Jamnadas Sakerchand* (2), [1959] E.A. 147 (C.A.). There Seymour opened a letter of credit through a bank for the payment of certain goods to be shipped to him against delivery of the shipping documents, and the bank duly accepted the documents and made payment. The documents required by the letter of credit were the invoice, bill of lading, weight account and a certificate of origin, and there was a condition in the letter of credit that the goods were “to be 85% clean”. This last term and others appeared in the invoice but not in the bill of lading, and the vendors having failed to supply the goods in the condition contracted for, Seymour endeavoured to hold the bank responsible for the loss that he had suffered. The court did not accept this submission, and Devlin, J. (as he then was) in his judgment said,

“The letter of credit enumerates a number of documents and it enumerates a number of particulars and it does not say specifically which particulars are to be put in the documents”,

and he went on to say that as a matter of construction it seemed to him that it was sufficient that the set of documents as a whole should between them contain the whole particulars, provided of course that each document contained such particulars as were necessary to make that document valid. That seems to me to be the position in the instant case. Devlin, J., did not consider that the term “85% clean” was of a nature which one would expect to find in the bill of lading, and in the instant case there is the evidence of Mr. Beament that it would be unusual to find in a bill of lading such a term as “new and sound bags”; this evidence was not contradicted. I would find therefore that, supposing a Polcargos certificate was required under the contract, it was not the intention of the parties that it should certify the soundness of the bags. Secondly I would find that the term “soundness” was sufficiently covered in the shipping documents by its inclusion in the invoice, without inclusion in the bill of lading or other shipping documents. It follows that I would find that the appellant was in breach of the contract in refusing to take delivery and to honour the draft. The bank of course had to comply strictly with the terms of the letter of credit, and could not in the circumstances have accepted the documents without instructions from the respondent.

This leaves only the question of damages. On failure of the appellant to take delivery the sugar was sold off in lots over a period of time extending from the first sale of one hundred bags on March 14, 1958, to the sale of the last twenty-two bags on September 29, 1958. In its plea, the respondent gave as a reason for this the alleged fact that in March the market was overstocked and the sugar could only be sold “as and when buyers are obtainable”, and that as a result of these conditions and of a falling market, a loss on the contract was suffered. The appellant in his written statement contested the correctness of the respondent’s claim as to the difficulty in selling a large quantity of sugar at once, and put them to strict proof. The learned Chief Justice said:

“I accept that there was a market for it and that its normal price was a few shillings cheaper per kilo bag than Formosan sugar. Would it have flooded the market and caused a catastrophic fall in prices? I do not think so on the evidence. The probabilities seem to favour this view. There is a re-export market and in addition it appears that Aden itself consumes between ten and fifteen thousand bags each month. A quantity such as five thousand bags, between ten days or a fortnights’ supply could not, one would think, have caused any considerable fall. I accept that there would have been some fall. I find that there was an available market of which the plaintiffs did not reasonably take advantage.”

The learned Chief Justice then went on to consider the evidence of the many witnesses who were called on the question of price and marketability. His conclusions were in the following terms:

“It will thus be seen that there is a considerable difference between the prices given. Moreover the evidence is largely an estimate since none of the witnesses seems to have done any selling of large amounts of Polish sugar at that time.

“I think the real guide to what the plaintiffs should have obtained is by examining what they did in fact obtain.

.....

The plaintiffs, I hold, should have started selling within a reasonable time after the arrival of the ship, allowance being given for landing and

arrangements being made and the finding of buyers for this large consignment.

“On March 14, 1958 and March 15, 1958 four hundred bags were sold in three lots at an average price of Shs. 83/25 per bag. I think that in view of the large quantity to be sold the price for five thousand bags should be reduced Shs. 3/- per bag. The plaintiffs should therefore have obtained Shs. 401,250/-. Their loss would therefore have been Shs. 12,599/85.”

One cannot but agree that the evidence does disclose “a considerable difference between the prices given”. Not only that, but there was substantial evidence that there was not a ready market for the sale of a large quantity of sugar at the prevailing price on or soon after February 28. Mr. Beament, as manager of the respondent company, said not. Mr. Iswar, who described himself as a trading manager of the respondent company, said he instructed Mr. Gopoldas to sell the sugar, but that “He produced nobody willing to buy five hundred tons”. Mr. Gopoldas confirmed this by saying:

“The market could not absorb five hundred tons just then. It could have all been sold at once at a very great reduction. Other merchants were having difficulty in getting rid of their sugar”.

.....

“I could have brought fifty customers in a month who would have each bought one hundred bags.”

So far as Mr. Gopaldas’ evidence related to prices he said he could have obtained, the learned Chief Justice was of the opinion that he was boasting. The learned Chief Justice also referred to Mr. Bhatt’s evidence that to have sold a large quantity of the sugar within one month of its arrival the price would have had to have been reduced by Shs. 5/- per bag. There was therefore ample evidence, and I have not mentioned it all, on which the learned Chief Justice could find, as he did, that in view of the large quantity of sugar to be sold the price for a quick sale of it all would be less per bag than on a sale of a small quantity; he assessed this lesser figure at Shs. 3/- per bag, and on the evidence this was not in my opinion unreasonable.

I do not intend to refer in detail to the evidence relating to prevailing market prices at the relevant time or times. It was referred to by the learned Chief Justice and I think he was entitled to say:

“the real guide to what the plaintiffs should have obtained is by examining what they did in fact obtain”.

There is no suggestion that the respondent did not obtain the best prices it could, and its method of disposal suggests that it did its best. The learned Chief Justice took the prices obtained by the respondent for the first comparatively small lots sold on March 14 and March 15, and from the average price of Shs. 83/25 he deducted the Shs. 3/- referred to. Mr. Nunn has submitted that the learned Chief Justice overlooked the fact that in addition to the c.i.f. price there were loading charges amounting to about Shs. 4/- per bag. He gave no notice of cross-appeal however, and anyway “landing charges” at Shs. 6,763/60 were included by the appellant in his claim and were accepted by the learned Chief Justice in assessing damages.

The last ground of appeal is:

“(8) The learned Chief Justice failed to take into consideration the fact that the respondent (plaintiff) took no step to mitigate the loss, if any, by disposing of the goods without unnecessary delay.”

Mr. Mansoor referred to s. 52 (2) of the Sale of Goods Ordinance (Cap. 137) which reads:

- “(2) Where there is an available market for the goods in question the measure of damage is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept.”

The learned Chief Justice made an allowance for the time required for the landing of the sugar and for arrangements to be made to find buyers for so large a consignment; it appears also that a Lloyd's survey report had to be obtained, certain damage having been suffered. In the circumstances it can hardly be said in my opinion that there was an “available market” on February 28, or until the sugar could reasonably be made ready for marketing. Be that as it may, the section goes no further than saying that the measure of damages is “*prima facie*” to be ascertained in the manner set out therein. Each case must depend on the prevailing circumstances, and in my view the learned Chief Justice was entitled to make such allowance in time as he did. Paragraph (8) of the memorandum of appeal itself suggests that some delay would or might be necessary.

For the reasons given I would dismiss the appeal with costs.

I would draw the attention of the learned advocate for the appellant to r. 62 (8) of the Eastern African Court of Appeal Rules which requires that:

- “Each copy of the record shall be certified correct by the appellant or his advocate, or, if prepared by the registrar, by him.”

In the present case the copies were full of errors, which necessitated frequent reference to the original record, and this caused considerable inconvenience and waste of time. Had the appellant succeeded in his appeal, this is an instance in which I would have ordered that the costs of preparing the record be paid by the appellant.

Sir Kenneth O'Connor P: I agree that the appeal should be dismissed with costs. There will be an order accordingly.

Gould JA: I have had the advantage of reading the judgment of the learned Justice of Appeal and agree with him that the appeal should be dismissed with costs. I do not, however, take the view that on the proved or accepted facts, the case can be regarded as falling, without qualification, within the principle enunciated in *Midland Bank v. Seymour* (1).

The facts are that the contract for sale of the sugar was dated January 28, 1958, and called for a letter of credit for the full c.i.f. value to be opened in favour of Messrs. M. Golodetz. It was opened on the same day, January 28. A few days later an amendment was made to the contract to the effect that the jute bags should be “new” ones, and (as was accepted by counsel for the respondent on the appeal) shortly thereafter, probably on February 6, it was also agreed that the bags should be “sound”.

The documents to be handed over by Messrs. M. Golodetz in exchange for payment on the letter of credit were not specified in the contract and, as the learned Justice of Appeal has said, where a c.i.f. contract does not mention the documents to be handed over, they would be deemed to be the usual shipping documents, which normally means, a bill of lading, an insurance policy and an invoice. The conduct of the parties in the present case however, makes it clear, in my opinion, that the requirement of a Polcargo certificate was a legitimate one. It was included in the requirements of the first letter of credit, and was acquiesced in without demur, by Messrs. M. Golodetz. Nowhere in the correspondence

is it suggested that a Polcargo certificate was not a document within the contemplation of the contracting parties, or that the appellant was not entitled to one. Messrs. M. Golodetz were not, of course, the actual vendors, but they were the parties designated by the vendors in the contract as the beneficiaries under the letter of credit and who would therefore be tendering the shipping documents. There is no evidence as to the arrangements between the respondent company and Messrs. M. Golodetz, but in the ordinary way of things the respondent company must either have instructed Messrs. M. Golodetz as to the documents they were to provide, or left it to them to provide the documents for which the contract appeared to call. One amendment, concerning insurance, was in fact objected to by Messrs. M. Golodetz in their cable, exhibit 17, as not being in conformity with the contract. As Messrs. M. Golodetz, without protest, did provide a Polcargo certificate I think it must be taken as having been within either their instructions or their authority to do so, and that the respondent company ought not now to be heard to say that such a document was not within the contemplation of the parties to the contract.

If, then, it be accepted that the Polcargo certificate was a document within the contemplation of the parties to the contract what is the position? No argument has been advanced that it is not a proper function of such a certificate to include packing and no objection was made by Messrs. M. Golodetz on that ground. The position of the bank which refused to accept the documents is, I think, clear. They had a mandate to honour drafts provided they were accompanied by instruments including a Polcargo certificate which was to specify the packing as finally agreed, the packing was to be in new sound jute bags. The bank was therefore justified in refusing a certificate which did not include the word “sound”, and so far as the bank is concerned I think the case is distinguishable from that of *Midland Bank Ltd. v. Seymour* (1). In that case the shipping documents were considered as a set, there being no requirement that any particular document should contain specified particulars. In the course of his judgment Devlin, J., said:

“That seems to me to point to the view that they are considering the shipping documents as a set of documents; and dealing with them, therefore, as a set of documents they say that the set must contain the particulars under the heading “Description, Quantity and Price”. Nothing would have been simpler than to have provided for a particular document containing a special part of those particulars if that had been thought necessary.”

In the present case there was such a specific requirement in the case of the Polcargo certificate and I think that the bank’s course of action in refusing acceptance and in referring the matter back to the appellant for instructions, was justified. That, however, does not prevent the appellant from being in breach of his contract, if the mandate which he gave the bank did not accurately reflect the terms of the contract of sale. If that were the case he had an opportunity of rectifying the error when the bank sent him a schedule which, if he had signed it, would have authorised the bank to accept the documents in the form in which they were tendered.

The bulk of the evidence concerning the introduction of the descriptive word “sound” into the contract was given by the appellant. He said that a Mr. Iswar, an employee of the respondent company, and his own clerk, went to the Bank of India on February 6, 1958, and returned with a pencil draft embodying a consolidated amendment to the letter of credit. The draft (exhibit 11) was typed in his office and the typescript became exhibit 9. The two clerks went to Mr. Beament, the manager of the respondent company’s trading department, who struck out certain words. The relevant clause of the draft, which was in the form of a letter of instruction to the Bank of India was:

“(c) Packing in new sound single jute bags, all documents of credit should show such packing,”

and the words struck out were all those following the word “bags”. Mr. Beament himself denied (or could not remember) agreeing to any such amendment, but, in spite of a contrary finding by the learned trial judge, counsel for the respondent company conceded that Mr. Beament did agree to the undeleted words in para. (c) above. Probably counsel’s attitude was due in part to the evidence of Mr. W. Ramjel, manager of the Bank of India, called by the appellant, whose evidence tended to confirm that of the appellant concerning exhibit 11 and who said in effect, that he had himself suggested the words which were struck out, but that his suggestion had not been accepted.

This agreement to amend the letter of credit took place on February 6. There is in evidence a letter dated February 4 from the Bank of India to Messrs. M. Golodetz stating that the letter of credit had been amended by the insertion of the words “new and sound” but there is no evidence that the respondent company had agreed to the word “sound” at that stage. The question is whether, on or about February 6, the respondent company, by agreeing that the letter of credit should be amended to include the word “sound” had agreed that that word must be included in the document already specified as the one to include packing, i.e. the Polcargo certificate. Had the word been included in the original contract I think that would clearly have been the case. But as this was a later amendment I think that the surrounding circumstances must be looked at, as at the date of that amendment. The contract specified shipment by a vessel to load at the end of January or early February, and both parties to the contract must have known that the ship might well have sailed before February 6, and that it would in such circumstances be impossible to obtain an amendment to the certificate. The certificate itself (exhibit 6) is dated February 3, and shows that loading took place from January 29 to February 2. Counsel for the appellant argued that whether the respondent company was in a position to amend the certificate was not the appellant’s concern and that he was entitled to a Polcargo certificate in accordance with the amended agreement. I am unable to agree. The surrounding circumstances at the time of the amendment were such that the parties, being aware that it would most probably be impossible to insert the new term in the Polcargo certificate, must have intended that it would suffice if the shipping documents as a set showed that the bags were sound. This was done by the insertion of the extra word in the invoice, the only means by which Messrs. M. Golodetz could comply with the requirement at that stage. I have arrived at this conclusion without considering the evidence that Mr. Beament struck from the draft (exhibit 11) the requirement that all documents of credit should show the packing, as the admissibility of that evidence as an aid to the construction of the amended contract was not argued, and the question may be a doubtful one. Even without the aid of that evidence, I would not ascribe to the parties in the circumstances, an intention to agree to a requirement which both knew, or must be deemed to have known, was most probably impossible of fulfilment.

As regards the second question in the appeal, the measure of damages, I agree with the reasoning and conclusions of the learned Justice of Appeal and have nothing to add.

For the foregoing reasons I agree with the order proposed by the learned Justice of Appeal.

Appeal dismissed.

For the appellant:

MH Mansoor

For the respondent:

Westby Nunn

For the appellant:

Advocates: *M Husain Mansoor*, Aden

For the respondent:

Westby Nunn & Kazi, Aden

FW Crowie v R
[1961] 1 EA 38 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	6 February 1961
Case Number:	207/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Crawshaw JA
Appeal from:	H.M. Supreme Court of St. Helena–Alford, C.J

[1] Criminal law – Rape – Evidence – Complaint – Complaint made in answer to question – Question not leading – Whether evidence of complaint admissible – Eastern African Court of Appeal Order-in-Council, 1950 – Eastern African Court of Appeal (Amendment) Order-in-Council, 1958 – Sexual Offences Act, 1956, s. 1 (1) – St. Helena Order-in-Council, 1935, paras. 1 and 4 – Interpretation and General Law Ordinance (Cap. 54), s. 25 (St. H.) – Appeals Ordinance, 1960 (St. H.).

Editor's Summary

Among numerous grounds of appeal advanced against his conviction for rape the appellant submitted that evidence of a complaint by the girl concerned had been wrongly admitted at his trial. This evidence was that after the incident the complainant and another girl walked to the fence of a policeman's house and, after conversing with the policeman's wife, the complainant sent the other girl to collect her coat and money stating that she, the complainant, was afraid to go herself; that when the girl went away the complainant when asked by the policeman's wife why she was afraid then revealed the alleged rape. It was submitted that this was a conversation and not a complaint. The appellant also submitted that the case for the defence was not adequately put before the jury since *inter alia* the trial judge in his direction did not refer either to the complainant's emerging with the appellant from the room where the alleged rape had occurred with his arm round her neck and to their subsequent amicable conversation, or to the state of the complainant's knickers, which were inconsistent with the complainant's story.

Held –

- (i) the question put by the policeman's wife to the complainant was not of a suggestive or leading character but a natural one in the circumstances; the complainant was not induced to make her statement and the evidence was admissible.

- (ii) the failure of the trial judge to put to the jury evidence which merited careful consideration and tended to disprove the complainant's story constituted a major defect in the summing-up and since the jury might well have reached a different conclusion if their attention had been drawn to this evidence the conviction could not stand.

Appeal allowed. Conviction and sentence set aside.

Cases referred to:

- (1) *R. v. Merry*, 19 Cox C.C. 442.
- (2) *R. v. Osborne*, [1905] 1 K.B. 551.
- (3) *R. v. Norcott*, [1917] 1 K.B. 347.
- (4) *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462.
- (5) *Chan Kau v. R.*, [1955] A.C. 206.

Judgment

Sir Alastair Forbes V-P: read the following judgment of the court: This is an appeal under the Appeals Ordinance, 1960, of St. Helena from a conviction and sentence of the Supreme Court of St. Helena. This

court is authorised to entertain appeals from St. Helena by the Eastern African Court of Appeal Order-in-Council, 1950, as amended by the Eastern African Court of Appeal (Amendment) Order-in-Council, 1958. This appeal is, in fact, the first to be preferred to this court from St. Helena.

The appellant was convicted by the Supreme Court of St. Helena of the rape of one Winifred Kathleen Thomas contrary to s. 1 (1) of the English Sexual Offences Act, 1956 (which applies in St. Helena by virtue of s. 25 of the Interpretation and General Law Ordinance, Cap. 54 of the 1950 Edition of the Laws of St. Helena) and was sentenced to thirty months' imprisonment. He now appeals against this conviction and sentence.

The trial took place before the Governor of the territory, sitting as Chief Justice, and a jury. All that need be said at this stage in regard to the facts of the case is that the appellant admitted having had sexual intercourse with the complainant, and the only practical issue for the jury was whether or not the complainant had consented to such intercourse. Such other facts as it is necessary to refer to will sufficiently appear in the course of this judgment.

The memorandum of appeal submitted on behalf of the appellant sets out the following grounds of appeal:

- "1. Trial judge has no legal qualifications. Title of 'Chief Justice' is one given to all Governors of the Colony.
- "2. Inadmissibility of evidence given by Constable Leo and his wife Mrs. Leo.
- "3. Medical evidence in effect that the conditions found were not consistent with what would have been found had intercourse taken place with the consent of prosecutrix, were not statements of fact; but merely opinions.
- "4. Misdirection by judge to jury to accept questions put by Mrs. Leo to prosecutrix as being complaint made to her by prosecutrix. The judge also accepted, without proof, that Mrs. Leo was the first person that prosecutrix had spoken to, other than a friend who was a young girl. This was an assumption on his part, as, in point of fact, prosecutrix had walked something like, a conservative estimate of, 600 yards, through a well-populated area, and could possibly have spoken to several people; she had to pass Mrs. Leo's to get to her own home which was just across the road.
- "5. Conflicting evidence given by Mrs. Leo in court to both the prosecution and the defence. When questioned by prosecutor she said that 'she did not ask prosecutrix any questions at all', and 'that prosecutrix had reported the matter to her of her own free will', and that 'the reason why prosecutrix had reported the matter to her was because that prosecutrix knew that she (Mrs. Leo) was a policeman's wife, and that she would report the matter to her husband'. In cross-examination she (Mrs. Leo) admitted that 'she heard prosecutrix discuss her soiled clothing and appearance with her friend, and ask her to go to her home to collect certain articles, as she (prosecutrix) did not want her mother to see her'. Because she (Mrs. Leo) was curious, she left her gardening to speak to prosecutrix, and *asked* her 'how did she get her dress like that'. 'That because of the questions she (Mrs. Leo) asked prosecutrix, she was told the whole story'. Contrary to Mrs. Leo's evidence that prosecutrix knew that she (Mrs. Leo) would report the matter to her husband; Mrs. Leo did not do so; but advised prosecutrix to 'tell the Salvation Army Captain, if you were not as bad as the boy'. Constable Leo heard his wife say this, and when she came inside he asked her 'what did she tell the girl to report to the army captain'. Then and only then, did Mrs. Leo, in her own words, tell her husband the whole story.

- “6. Prosecutrix’s admission that ‘she did *not* complain to Mrs. Leo at all, but merely spoke to her in gossip as she (prosecutrix) did not think that Mrs. Leo would betray her confidence’. In support of this is the proof that when questioned by the police (the husband of Mrs. Leo) prosecutrix denied that anything had happened to her at the dairy. Surely if prosecutrix had reported the assault to a policeman’s wife so that she would tell her husband, then prosecutrix would expect the police to question her.
- “7. A tea party consisting of reputable people, i.e. Captain and Mrs. Malins, the Reverend Hayward and Mrs. Hayward all heard laughter, and Mrs. Malins identified the laughter, but no one heard frantic screams for help kept up for some minutes as alleged by prosecutrix.
- “8. Prosecutrix’s evidence ‘that she had walked from the room (where she had just been raped) hand in hand, and with one arm (his) around her neck’. Surely a young woman, in the condition referred to by the learned judge in his summing-up, i.e. ‘a young woman to whom something dreadful had just happened, and who wanted to tell the first person she met’, surely her feelings would have been of revulsion for the man?
- “9. This young woman, the prosecutrix, was in no hurry to report the matter to anyone. She admitted that she spent some time in the company of the man who had raped her discussing with him such things as ‘who should wash the blood off her clothes’! When he jokingly replied ‘he would do so and hang her knickers in the yard’ (where the farm hands could see them) the prosecutrix, on her own admission went to the back of the dairy and washed the blood spots off her dress herself. She also admitted hiding her knickers at home to wash out when she was alone.
- “10. The knickers in question were of an interlock material. Prosecutrix stated that ‘Crowie got his fingers over the top of her knickers and that he struggled to remove them whilst she struggled to keep them on’. (a) The knickers showed no sign at all of having been involved in a struggle of this nature. (b) There was no sign of a tear, or even broken threads. (c) The elastic in both legs and waist were intact. (d) Prosecutrix admitted that the knickers were not removed, but were as far down as her knees. This fact alone would tend to show that intercourse with a virgin would be practically impossible unless she co-operated. Medical evidence showed no marks on abdomen.
- “11. That the verdict of the jury was not a verdict reached by independent thinking, but rather, one that was influenced by the foreman of the jury who was a former government secretary of this Colony, and is now the managing director of the largest firm on the island. It was noted by the defence that only the foreman of the jury made notes. Not one of the jurymen made any notes. The jurymen were all islanders, and it is felt that several were utterly ignorant of some of the terms used in court.
- “12. That the judge’s summing-up, and in particular his acceptance of the evidence of Mrs. Leo, which, to say the least was most conflicting, was the sole evidence that caused a verdict of ‘guilty as charged’ to be brought or returned against Crowie. That Mrs. Leo was not a reliable witness, nor a reputable one, is supported in point of fact that Mrs. Leo herself has a police record of three convictions.”

Certain of these grounds of appeal can be disposed of briefly.

Ground 1: There is no substance in this ground of appeal. Paragraph 2 of an Order-in-Council dated February 13, 1839 (p. 866 of the 1950 Edition of the Laws of St. Helena) which makes provision for the administration of justice in the island of St. Helena, as amended by para. 4 of an Order-in-Council

dated October 3, 1935 (p. 888 of the 1950 Edition of the Laws of St. Helena) which makes further provision for the administration of justice in St. Helena, provides:

- “2. And it is further ordered that the said Supreme Court of St. Helena, shall consist of, and be holden by, and before one judge, which judge shall be called the Chief Justice of the Supreme Court of St. Helena to be named and appointed from time to time by Her Majesty, her heirs and successors, by Letters Patent, under the Public Seal of the said Island of St. Helena; and that such judge shall hold his office during the pleasure of Her Majesty, her heirs and successors and not otherwise.”

There is no requirement that the Chief Justice shall have legal qualifications.

And para. 1 of the latter Order-in-Council provides:

- “1. Notwithstanding anything contained in the said Order-in-Council of the 13th day of February, 1839, and until His Majesty otherwise directs, it shall be lawful for the Supreme Court of St. Helena to be holden by and before the Governor for the time being or by and before any fit and proper person appointed by him, and the said Governor or such other person may if it be deemed expedient sit with an assessor or assessors and in that case the provisions contained in the said Orders-in-Council of the 29th day of June, 1878, and the 10th day of January, 1910, with regard to the summoning of assessors shall apply accordingly.”

Trial before the Governor, whether legally qualified or not, is thus authorised.

Ground 2: We see nothing inadmissible in the evidence given by Constable Leo, which merely states how he came to commence investigations. He does not give details of any statement made to him by the complainant. We deal below with the question of the admissibility of the evidence given by Mrs. Leo.

Ground 3: The doctor was an expert witness and as such was entitled to express his opinion based on the nature of the injuries found on the complainant. The jury were adequately directed on the matter.

Ground 4: Subject to the question of the admissibility of the “complaint” made by the complainant to Mrs. Leo, with which we deal below, we see no substance in this ground. The Chief Justice did not instruct the jury that Mrs. Leo was the first person to whom the complainant had spoken other than the young girl Clingham. He said:

“She did not complain to the first person she saw, who was the girl Clingham, but you may think that Clingham, who was then not fifteen years old, would have been an unsuitable person to complain to. Very soon afterwards she did tell Mrs. Leo, and you will have to consider whether the circumstances of her telling the story to Mrs. Leo, not as soon as she saw her but fairly soon afterwards and, as appears from the evidence, more or less unsolicited, tend to show that the prosecutrix’s frame of mind after the event was that of a young woman to whom something dreadful has happened and who wants to tell somebody about it. Her mother may seem to have been a better person to tell, but the prosecutrix may as she says have been frightened of doing so.”

We can see no implication that Mrs. Leo was the first person the complainant met after leaving the scene of the alleged rape, and, in the absence of evidence, cannot speculate upon whether she might have met someone else on the way to whom she might be expected to complain.

Ground 5: We find it difficult to follow this ground. Various statements attributed to Mrs. Leo in it are not borne out by the record of the evidence

given by her. On the face of the record it appears to us that her evidence is reasonably clear and consistent and we see no misdirection in the way it was put to the jury.

Ground 6: This appears to be argument in support of ground 2, that Mrs. Leo's evidence was not admissible.

Ground 7: It seems probable from the evidence as to times that the tea party had broken up before the alleged rape took place. The Chief Justice instructed the jury to disregard the evidence of what was heard by the persons at the tea party since the:

“other evidence for the prosecution suggests strongly that any sounds heard at the time had nothing to do with the case.”

We see no reason to disagree with this view.

Ground 11: We regard this ground as frivolous. There is nothing to support the allegations made and none of the jurors selected was challenged by the appellant. He cannot be heard now to say the jurors were incompetent or unqualified, and he has put forward no sound ground for alleging prejudice.

Ground 12: We have already expressed the view that Mrs. Leo's evidence appears reasonably consistent. So far as the allegation that Mrs. Leo had previous convictions is concerned, we regard this as improper. There is no evidence as to this and Mrs. Leo was not cross-examined as to the alleged convictions. It is not open to the appellant to raise the matter now. The question of the effect of Mrs. Leo's evidence is, however, a different matter, and we deal with this below.

We turn now to the question of the admissibility of the evidence relating to the complaint to Mrs. Leo. This question is raised in ground 2 of the memorandum of appeal. The evidence is to the effect that after the alleged rape, which is said to have taken place at Longwood Dairy, the complainant washed some blood off her dress at the dairy, then accompanied the girl Clingham as far as the fence of Mrs. Leo's house. The distance involved does not appear in the record of the evidence, but probably it was well known to the members of the jury and it is stated to be some 600 yards in the memorandum of appeal. Then there was some conversation between the complainant, the girl Clingham and Mrs. Leo, and the complainant sent the girl Clingham to fetch her (the complainant's) coat and money for collection from the complainant's home, saying she was frightened to go herself. Mrs. Leo then asked the complainant why she was frightened, and the complainant told her the story of the alleged rape. Mrs. Leo reported this to her husband, Constable Leo, as a result of which the investigation commenced. The complainant in her evidence stated she did not tell her parents what had taken place because her mother would have been angry; that she at first denied to the police that anything had happened to her; and that she would not have told Mrs. Leo if she had thought Mrs. Leo would tell anyone.

Kenya Crown Counsel, who appeared at the hearing of the appeal for the Crown, and to whom we are indebted for drawing attention, very properly, to the points in favour of the appellant as well as arguing in support of the conviction, drew our attention to the cases of *R. v. Merry* (1), 19 Cox C.C. 442, and *R. v. Osborne* (2), [1905] 1 K.B. 551. In *R. v. Merry* (1), a case of indecent assault on a girl aged nine, evidence was sought to be given of an alleged complaint made by the child to her mother on the evening of the day in question. On it appearing that the complaint was made in reply to a question by the mother, Bruce, J., ruled:

“A conversation is not a complaint. If the statement sought to be given in evidence is in answer to a question put to the complainant in the absence

of the prisoner by a third person, and is not volunteered by the complainant of her own initiative, the particulars of such statement are, on that ground alone, not admissible in evidence within the rule in *R. v. Lillyman*.”

In *R. v. Osborne* (2), a similar question arose for consideration, and the court for Crown Cases Reserved said at p. 555:

“It was contended for the prisoner that the evidence was inadmissible—first, because the answer made by the girl was not a complaint, but a statement or conversation, having been made in answer to a question; and secondly, because, as Keziah Parkes was under the age of thirteen, her consent was not material to the charge. As to the first point, the case of *R. v. Merry* was quoted. In that case a question had been put to a girl of nine years old by her mother in a case of indecent assault, and the learned judge ruled that, as the proposed evidence was a statement made in answer to a question, it was a conversation and not a complaint, and he declined to allow it to be given in evidence. It does not appear, however, from the report what the question was that was put to the girl. It appears to us that the mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have that effect, and will render it inadmissible; but a question such as this, put by the mother or other person, ‘what is the matter?’ or ‘why are you crying?’ will not do so. These are natural questions which a person in charge will be likely to put; on the other hand, if she were asked, ‘did so-and-so [naming the prisoner] assault you?’ ‘Did he do this and that to you?’ then the result would be different, and the statement ought to be rejected. In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge. If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first.”

The decision in *R. v. Osborne* (2), was considered and applied in *R. v. Norcott* (3), [1917] 1 K.B. 347, when Viscount Reading CJ delivering the judgment of the Court of Criminal Appeal, said at p. 350:

“It appears to us that it never was intended that the word ‘induced’ should be interpreted as referring to a statement made by the prosecutrix in answer to a question, or to a question which led her to make her complaint. The court meant to exclude evidence of a complaint made in answer to questions of a leading or suggestive character. It is obvious why the court took that view. Evidence of this nature is admitted as being evidence of the consistency of the conduct of the prosecutrix with the complaint made by her, and in that way is regarded as some evidence that her story in the witness-box is probably true. The court in *R. v. Osborne* meant to guard against admission in evidence of statements which have been put into the mouth of the prosecutrix by questions of a leading or suggestive character. The court is concerned to see that in the present case the statement made by the girl was spontaneous in the sense that it was her unassisted and unvarnished statement of what happened. That she may have been persuaded to tell her unassisted and unvarnished story is no reason why the evidence of her having made the statement should be rejected. Consideration of the principles expounded by Ridley J in the

judgment in *R. v. Osborne* to which I have referred shows that that is so. With the view expressed by him this court is in entire agreement.”

Applying these principles to the instant case, we are of opinion that the evidence was properly admitted. The question put to the complainant by Mrs. Leo was not a leading question, but was a natural one in the circumstances. We think that the Chief Justice’s comment that the telling of the story was “more or less unsolicited” was justified by the evidence. It is to be noted that the first evidence of the report to Mrs. Leo at the trial was brought out in the course of the cross-examination of the complainant by counsel for the appellant; and that no objection was taken at the trial by counsel for the appellant to the evidence given by Mrs. Leo. On the contrary, the circumstances of the making of the report were relied on by the defence as being inconsistent with absence of consent. In view of these facts we do not feel able to say that the Chief Justice wrongly exercised his discretion in admitting Mrs. Leo’s evidence.

We turn now to grounds of appeal 8, 9 and 10. These grounds, in effect, as we read them, are a complaint that the defence case was not put to the jury by the Chief Justice. To consider this it is necessary to set out the summing-up in full. It is as follows:

“Before I sum up the evidence I must explain to you two matters that arise in this class of case. In a charge of sexual offence the prosecution is allowed to bring evidence to show that the prosecutrix made a complaint shortly after the act. This is not to prove the truth of the matters stated but to confirm her testimony and to disprove her consent. That is why you have heard evidence as to what the prosecutrix said after the event, evidence which would in other kinds of cases be ruled out as ‘hearsay’. If this evidence is regarded in its proper light it is not ‘hearsay’ evidence as to what took place in the dairy; it is direct evidence of the fact that the prosecutrix told somebody soon afterwards that something had taken place.

“The other matter is that in a case of this kind it is dangerous to act on the uncorroborated testimony of the prosecutrix. If the prosecutrix’s evidence is in fact corroborated, that point does not arise, and in this case there is evidence which is capable of being corroboration.

“It is admitted by the defence that sexual intercourse with the prosecutrix occurred at the time and place stated in the charge. The question you have to decide therefore is whether it took place with the consent of the prosecutrix, in which case no crime has been committed, or without that consent and by force. If you decide that it occurred without the consent of the prosecutrix and by force you will have to find the accused guilty.

“You must first consider whether the actions of the prosecutrix after the event confirm the view that she was forced against her will. She did not complain to the first person she saw, who was the girl Clingham, but you may think that Clingham, who was then not fifteen years old, would have been an unsuitable person to complain to. Very soon afterwards she did tell Mrs. Leo, and you will have to consider whether the circumstances of her telling the story to Mrs. Leo, not as soon as she saw her but fairly soon afterwards and, as appears from the evidence, more or less unsolicited, tend to show that the prosecutrix’s frame of mind after the event was that of a young woman to whom something dreadful has happened and who wants to tell somebody about it. Her mother may seem to have been a better person to tell, but the prosecutrix may as she says have been frightened of doing so. Against her story about intercourse against her will are her first remarks after the event, of which evidence has been given—‘Don’t worry’ to Clingham and ‘look what you have done to me’ to the accused. But not conclusively against. The question primarily is not what she thought about it afterwards; it is whether she consented at the time.

“As to corroboration, there are two pieces of evidence which corroborate the story of the prosecutrix—if you believe them. The girl Clingham said that when the prosecutrix came out of the store-room the prosecutrix was crying.

“The medical evidence is that the injuries found were not consistent with intercourse with consent. That evidence of course cannot be conclusive, but you must give it the weight due to the opinion stated on oath by a very experienced doctor. You must on the other hand, take account of the fact that there was no injury of the abdomen or labia majora, and you must consider whether in the absence of such injury the other injuries are consistent with a mere violent deflowering with the woman’s consent.

“You must disregard the evidence about the screams or the boisterous laughs testified to by the witnesses Malins and Mercury. It seems clear that Mercury was referring to the same sounds as Malins, and the latter said he heard them at ‘roughly 4.30 to 4.45 p.m.’. The other evidence for the prosecution suggests strongly that any sounds heard at the time had nothing to do with this case.

“As to this screaming, the prosecutrix gave evidence that she had screamed for ten minutes. It is not likely that she could make any accurate estimate of the time during which she was being assaulted if her story is true. Three or four minutes might I suppose seem like ten minutes to her, whatever her idea of ten minutes may be.

“You may think that the prosecutrix had no business to be at the dairy; you may think that she was courting danger and even that she was not unwilling to indulge in loose behaviour with the accused. But that is not in itself consent to intercourse.

“Let me remind you again that the issue you have to decide is simply this: Did this intercourse, which is admitted to have taken place, take place with the consent of the prosecutrix or against her will?

“Before you can convict you must be satisfied by the evidence so that you can feel sure that the prosecution have established the guilt of the accused.

“Consider your verdict.”

It will be noted that so far as the evidence is concerned the principal matter stressed in the summing-up is the complaint to Mrs. Leo. Apart from that the attention of the jury is properly called to matters which may be taken as corroboration of the complainant’s story, and the jury is properly instructed that they must consider whether, in the absence of injuries to the complainant’s abdomen and labia majora, the other injuries “are consistent with a mere violent deflowering with the woman’s consent”. The only other matters of evidence referred to in the summing-up are the laughs and screams heard by the witnesses Malins and Mercury, which the jury are properly told to disregard, a brief reference, in relation to the complaint to Mrs. Leo, to the first remarks alleged to have been made by the complainant after the event, and the allegation by the complainant that she screamed for ten minutes. It was, however, a very important part of the defence case that the complainant’s conduct in emerging from the room where the rape was alleged to have taken place hand in hand with the appellant and with his arm around her neck, and her subsequent apparently amicable conversation with him, were not consistent with her story that intercourse had taken place by force. It was a further important part of the defence case that the state of the complainant’s knickers was inconsistent with her story. It seems to have been accepted that the knickers produced in court were the ones worn by the complainant at the material time, though no

witness so states, and we therefore accept this as a fact, in favour of the appellant. There is force in the appellant's contention that these are matters which tend to disprove the complainant's story. We think they merited careful consideration by the jury and should have been put to the jury by the Chief Justice. They were, of course, stressed by counsel for the appellant in his address to the jury, but this circumstance does not absolve a judge from putting material evidence to a jury. With very great respect we think the failure to put these matters to the jury constitutes a major defect in the summing-up. It is by no means clear to us that the jury would necessarily have reached the same conclusion had their attention been drawn to these matters by the Chief Justice. In the circumstances we think that the non-direction is vital and that it would be unsafe to allow the conviction to stand.

There is one other matter which confirms us in the view that the conviction should not be allowed to stand. It is one not raised in the memorandum of appeal, but is nevertheless a matter we must take into account. This is the failure of the Chief Justice to give the jury a clear instruction on the question of onus of proof. Nowhere in the summing-up does the Chief Justice in terms direct the jury that the burden of proof in a criminal case is on the prosecution. It is true that at the end of the summing-up he says:

"Before you can convict you must be satisfied by the evidence so that you can feel sure that the prosecution have established the guilt of the accused."

Had the case for the defence been fully put to the jury in the summing-up, we think this would just have sufficed as an instruction on the onus of proof, though we should have preferred a more explicit instruction. But where this rather tenuous instruction is combined with a failure to draw the jury's attention to main points in the defence case, we feel, with respect, that the summing-up as a whole must be regarded as unsatisfactory. Further, we think a clear instruction by the judge as to the burden of proof was particularly needed in this case as the view of the law apparently expressed by counsel for the Crown is not one with which we can agree. Counsel for the Crown is recorded as saying in his opening address to the jury:

"It is my duty, as public prosecutor, to draw your attention to the fact that the onus is upon the prosecution to prove the prisoner's guilt, but, gentlemen, if there is any doubt at all then the prisoner is entitled to it, once however the onus has been established, then it is for the prisoner to prove his innocence."

The concluding part of this statement is not, with respect, a correct statement of the law. It is well established that, apart from insanity and certain statutory exceptions, the burden of proving the guilt of an accused person is always on the prosecution and that burden never shifts (*Woolmington v. Director of Public Prosecutions* (4), [1935] A.C. 462; *Chan Kau v. R.* (5), [1955] A.C. 206). The legal burden of proof is to be distinguished from a provisional burden raised by the state of the evidence. The facts and circumstances proved by the Crown may be such that from them the fact in issue may be inferred, and it may be wise in the circumstances for an accused to call evidence to the contrary if he can; but it is never the case that the fact in issue must be so inferred unless the contrary is proved. Even if an accused person leads no evidence, the court must still, at the end of the case, ask itself: Is the legal burden discharged? Has the Crown proved the guilt of the accused beyond reasonable doubt?

For the reasons given we allow this appeal, set aside the conviction and sentence, and order that the appellant be set at liberty as regards this charge.

There are two other matters appearing on the face of the record upon which we think we should comment. The first relates to the exhibits. These do not

appear from the record to have been properly identified and produced in evidence by any witness. They appear to have been “put in” during the opening address of counsel for the Crown. The record reads:

“Morley opens case for prosecution.

“Rape now a statutory offence.

“Unlawful sexual intercourse without consent by force, fear or fraud.

“Fear and fraud not in issue in this case.

“Danger of finding guilty on uncorroborated evidence of prosecutrix alone.

“Complaint by prosecutrix to Mrs. Leo about 6.40 p.m. on the day in question.

“Outlines prosecution’s case.

“Pair of trousers put in and identified by accused, as those he was wearing on the day.

“Pair of knickers put in.

“Photographs of Longwood Dairy shown to jury to assist them. Defence has no objection.”

This is not sufficient. In a criminal case all matters must be strictly proved and the Crown cannot rely on concessions made by the defence; and exhibits, including photographs of the scene, should be produced to the court from proper custody and proved by the evidence of a witness on oath before being put to the jury. Where a witness has occasion to refer to an exhibit which has not yet been proved, the exhibit should be marked as such provisionally, but should not be regarded as evidence until it has been properly proved. In the instant case, had the conviction depended in any way upon the exhibits, it might have been necessary to allow the appeal for failure to prove them. In fact, as indicated above, the only significance of an exhibit (i.e. the knickers) was in favour of the defence, and as it appears that it was accepted by the Crown that the knickers were those worn by the complainant at the relevant time, we think it right to take account of the state of the knickers as a matter of defence, even though they were not properly proved by the Crown.

The second matter to which we would refer is that, according to the notes of evidence, it would seem that certain witnesses’ depositions taken at the preliminary inquiry were put to them in examination-in-chief. At p. 33 of the record it is recorded that the complainant “Confirms answers given before examining magistrates”; and at p. 34 it is recorded, in the course of the evidence of Dr. Gilbert: “Evidence to examining magistrates confirmed”. This is not a proper way to lead evidence for the Crown. The defence is entitled to cross-examine a witness upon his evidence given at the preliminary inquiry, as indeed upon any previous statement made by him, but depositions cannot be used in examination-in-chief. In the instant case the whole content of the witnesses’ evidence does appear to have been given afresh in the Supreme Court, and the irregularity of the depositions having been put to witnesses by counsel for the Crown does not appear to have affected the course of the trial; but we draw attention to the matter lest it tend to become a practice.

Appeal allowed. Conviction and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:

F de F Stratton (Crown Counsel, Kenya)

For the appellant:

Advocates: *Fred M Ward*, St. Helena

For the respondent:

The Crown Prosecutor, St. Helena

Ralli Estates Limited v Commissioner of Income Tax
[1961] 1 EA 48 (PC)

Division:	Privy Council
Date of judgment:	30 January 1961
Case Number:	42/1958
Before:	Lord Tucker, Lord Denning and Lord Morris of Borth-y-Gest
Appeal from:	E.A.C.A. Civil Appeal No. 52 of 1957 on appeal from H.M. High Court of Tanganyika–Crawshaw, J

[1] Income tax – Capital or income – Consideration payable for right of occupancy – Consideration based on tonnage of sisal fibre to be exported – Consideration limited to definite maximum sum – Whether consideration is a royalty – Whether consideration paid deductible in computing profits – East African Income Tax (Management) Act, 1952, s. 14 (1) – German Property (Disposal) Ordinance, 1948 (T).

Editor’s Summary

In March, 1950, the Tanganyika Government by public notice invited applications for the purchase of certain estates taken over by the Custodian of Enemy Property during the late war, which the Government had subsequently acquired. Ralli Brothers Limited which, since 1948, had managed two of these estates for the Government, applied to purchase some of the estates, and were successful in respect of the two estates managed by them. Negotiations ensued, as a result of which the Government agreed to grant to Ralli Brothers Ltd. a right of occupancy of the two estates for ninety-nine years, at a rent per acre, plus a royalty on all sisal fibre exported from the estates, up to a total of £174,600, but reducible in certain circumstances. Before any formal offer was made Ralli Brothers Ltd. formed a new company, the appellants in this appeal, whilst the Department of Lands and Mines consulted the Income Tax Department upon the proposed terms as a result of which the formal offer made by the Department of Lands and Mines in December, 1950, was addressed to the appellants and this offer described the payments, calculated upon the tonnage of sisal fibre exported as “balance of the purchase money”. The method of calculating this balance was the same as the royalty referred to in the negotiations. The appellants accepted under seal the written offer and the formal contract when prepared and executed followed the terminology of the offer by describing the payments on sisal fibre exported as “balance of the purchase monies”. The appellants’ operations in 1951 and 1952 were very profitable, and the entire sum of £174,600 was paid in two years. The appellants claimed that, in calculating their income the payments amounting to £174,600 should be deducted, on the ground that these were royalties payable per ton of sisal exported. The Commissioner of Income Tax refused to allow such a deduction, and the

appellants appealed to the High Court, and thereafter to the Court of Appeal. Both courts held that the payments were capital expenditure and were not deductible for purposes of income tax. On this further appeal it was contended for the appellants *inter alia* that if the course of the negotiations was looked at, the payments were truly royalties, alternatively that the payments were for the use of the sisal potential, and were fluctuating payments which rose or fell with the chances of the business.

Held –

- (i) the payments were not royalties; the payments were not payable throughout the ninety-nine years of the right of occupancy, but only for an indeterminate period at the beginning, probably only a few years, of the term, and the analogy with royalties did not fit.

- (ii) the payments were not “expenses wholly and exclusively incurred . . . in the production of the income” of the tax payer; the payments were made for a capital asset, and must be reckoned as capital expenditure.

Appeal dismissed.

[**Editorial Note:** Decision of the Court of Appeal reported (1958) E.A. 165.]

Cases referred to:

- (1) *Jones v. Commissioners of Inland Revenue* (1919), 7 T.C. 310.
- (2) *Mackintosh v. Commissioners of Inland Revenue* (1928), 14 T.C. 15.
- (3) *Mallett v. Staveley Coal and Iron Co. Ltd.* (1928), 13 T.C. 772.

Judgment

Lord Denning: The question in this appeal concerns the income tax payable in East Africa by a company called Ralli Estates Limited. That company was incorporated in Tanganyika on December 21, 1950, and ten days later, on December 31, 1950, it obtained the right to occupy two sisal estates for a term of ninety-nine years from January 1, 1951. These two estates were known as the Lanconi and Mjesani estates and comprised some 23,469 acres. They were used for the growing of sisal, which is used for producing fibre out of which can be made string, ropes and many other things. The company made considerable profits in the years 1951 and 1952 by producing sisal on these two estates and exporting it abroad: and it is liable to pay income tax on those profits. But it says that, in calculating its income, there should be deducted several payments which amount to £174,600 altogether for the two years 1951 and 1952. The Commissioner of Income Tax declined to make any deduction on account of these sums. The company appealed to the High Court of Tanganyika and on March 30, 1957, Crawshaw, J., dismissed the appeal. The company thence appealed to the Court of Appeal for Eastern Africa, who, on May 22, 1958, dismissed the appeal. Both courts held that the payments amounting to £174,600 were not revenue expenditure but capital expenditure, and were not deductible for purposes of income tax. The company now appeals to their Lordships' Board.

The principal statutory provision is s. 14 (1) of the East African Income Tax (Management) Act, 1952, which says that:

“for the purpose of ascertaining the total income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year of income by such person in the production of the income.”

The contest between the parties may be shortly stated thus: The company says that the payments amounting to £174,600 were made up of royalties payable at so much per ton of sisal exported, and they were therefore in the nature of a revenue expenditure. The Commissioner says that the payments amounting to £174,600 were part of the purchase price paid by the company for the two sisal estates, £70,300 being payable in respect of the Lanconi estate, and £104,300 in respect of the Mjesani estate. They were therefore capital expenditure.

These estates were at one time two of several estates in Tanganyika owned by enemy nationals. During the war of 1939-1945 and for some years thereafter they were under the control of the Custodian

of Enemy Property. He leased them on short leases at a nominal rent but a royalty was payable by the lessees. These royalties were based on a sliding scale according to the grades of

sisal produced and sold. Out of those royalties the custodian paid the cost of capital improvements made by the lessees with his assent, e.g. buildings, machinery and replanting. In this way most of the royalties were “ploughed back” into the land by planting sisal for future use, or expended on the purchase of machinery, or used for factories and houses for workers.

After the war the Government of Tanganyika made an Ordinance under which the Government itself acquired the ex-enemy estates. It did so by the German Property (Disposal) Ordinance, 1948. Included amongst them were the Lanconi and Mjesani sisal estates. These were transferred to the Tanganyika Government who, on July 1, 1948, became the owner of them. The Government entrusted the management of the two estates to *Ralli Brothers Limited*. It is to be noted that *Ralli Estates Limited* had not then been formed.

On March 17, 1950, the Tanganyika Government issued a public notice in the press whereby it invited applications for the purchase of the estates previously owned by enemy nationals, details of which were given in a catalogue of sale. Ralli Brothers Limited applied to purchase some of the estates and they were successful in regard to the Lanconi and Mjesani estates. Negotiations ensued as a result of which the Government, by letters of September 30 and October 26, 1950, agreed to grant a right of occupancy of these two estates to Ralli Brothers Limited for ninety-nine years from January 1, 1951, at (i) a rent of Shs 2/- per acre per annum, or (ii) a premium of £311,000, and (iii) a royalty on all sisal fibre exported from the two estates up to a total of £174,600 but reducible in certain circumstances.

Two months later, however, when the formal contract was concluded, it was made, not with Ralli Brothers Limited but with *Ralli Estates Limited*, a wholly-owned subsidiary formed by Ralli Brothers Limited for the purpose. The formal offer was contained in a letter of December 20, 1950, addressed by the Tanganyika Department of Lands and Mines to Ralli Estates Limited: and it was accepted by Ralli Estates Limited on December 31, 1950, under their common seal.

Moreover, the formal contract contained a very different description of the payments of £174,600. Whereas in the course of the negotiations they had been described as “royalties”, in the formal contract they were described as “balance of the purchase moneys”. The description in the negotiations was contained in a letter of September 30, 1950, which gave all the details of the proposed deal. A “royalty” was payable on every ton of line fibre exported by the company from Tanganyika. It was to be charged on a sliding scale based on the average f.o.b. price of line fibre at the rates shown in this table:

“Table of Royalties

<i>Price of Sisal</i> <i>per ton f.o.b.</i>	<i>Royalty</i> <i>per ton</i>
£70 or under	£1 0 0
£71 to £75	£3 15 0
£76 to £80	£5 19 0
£81 to £85.....	£8 3 0

£86 to £90	£10 10 0'
and so on	and so on
until	until
“£146 or over	£56 18 0.

There was a limitation, however, contained in the letter of September 30, 1950. It expressly provided that:

“Royalties will be payable until, in the case of each estate, the whole balance due by way of royalty (£174,600) is extinguished or until royalty

has been paid on the tonnage liable to royalty (19,397 tons) whichever occurs the earlier.”

When it came to the formal contract, the self-same payments were described as “Balance of Purchase Moneys”. They were to be paid by monthly instalments assessed by reference to the tonnage of line sisal fibre produced on the land and exported during the preceding month. The payments were to be calculated on a sliding scale at the rates shown in this Schedule, which contains figures identical with those in the Table of Royalties:

“Schedule	
<i>Rates at which Balance of Purchase Moneys to be calculated</i>	
<i>Price of Price of Line Sisal Fibre</i>	<i>Amount payable per ton</i>
£70 or under	£1 0 0
£71 to £75	£3 15 0
£76 to £80	£5 19 0
£81 to £85.....	£8 3 0
£86 to £90	£10 10 0
and so on	and so on
until	until
“£146 or over	£5 18 0.”

There was also an identical limitation in that the formal contract provided that:

“The said monthly instalments shall be paid until such time as either the balance of purchase moneys (£174,600) is paid or until the total fibre tonnage of 19,397 tons shall have been cut and accounted for, whichever shall first occur.”

In short, the formal contract provided that the £174,600 was not a royalty but was the balance of the purchase money of a capital asset, reducible, it is true, in certain events, but nevertheless part of the purchase moneys.

The reason for the change of nomenclature is not far to seek. After the parties had come in the negotiations to a provisional agreement, the Lands Department consulted the Income Tax Authorities: and in consequence, when drawing up the formal offer, changed the wording from “royalties” to “balance of purchase moneys” and made corresponding adjustments. If they were truly the balance of purchase moneys, payable for a capital asset, they would be capital expenditure and not deductible: whereas if they were truly royalties, they would be revenue expenditure and deductible.

The formal offer of December 20, 1950, describing the payments as “balance of purchase moneys” was accepted by the company: and it must be taken *prima facie* to be a correct description of the

payments. But their lordships hasten to add that the courts are not bound by the description. The parties cannot alter the true nature of the payments by giving a different label to them. Just as parties cannot turn a tenancy into a licence by calling it one, so they cannot turn a revenue expenditure into a capital expenditure by saying that it is such. Everything depends in the last resort on the true nature of the payments as determined by the courts: and for this purpose it is legitimate to look at the course of negotiations as well as the formal contract.

Mr. Borneman contended that, if you look at the course of negotiations, you will see that payments were truly royalties. He compared them with payments which a lessee of a coal mine or a sand pit makes on every ton of coal or sand that he digs and takes away. Such payments are, of course, revenue expenses and must be deducted in order to ascertain his income. Even though the asset

is a wasting asset, the payments are regarded as payments in the nature of rent. They are payments for the use of the mine or the pit. So here, says Mr. Borneman, the payments were made for the use of the “sisal potential” of the two estates.

Now if the royalties under consideration were the royalties under the short leases granted before 1950, there would be a great deal to be said for Mr. Borneman’s analogy. The custodian before 1950 used to let the estates for short periods at more or less nominal rents but royalties were paid on a sliding scale according to the grades of sisal produced and sold. Such royalties were no doubt revenue expenses comparable to the royalties on a sand pit. The sisal plants have an average life of seven or eight years. The royalties were in such cases paid for the use of the sisal plants for the term of the short lease. The lessee was entitled to cut and take away the leaves of the plants and make them into fibre and sell it. Thus he made his income and the royalty was an expense wholly and exclusively incurred in the production of the income. The lessee did not do any replanting of sisal except with the consent and at the cost of the custodian.

But their lordships are of opinion that Mr. Borneman’s analogy does not fit the ninety-nine years right of occupancy here under consideration. This was a long-enduring right very different from the short leases. The royalty was not payable throughout the ninety-nine years but only for an indeterminate period at the beginning, probably only a few years. It was not payable on all the sisal fibre produced during the ninety-nine years but only until the total amount paid was £174,600, or until 19,397 tons of fibre had been exported, whichever was the earlier. As it happened the price of sisal was so high that the whole amount of £174,600 was paid off in two years.

Their lordships reject, therefore, the contention that this was a true royalty and turn to Mr. Borneman’s second contention. He said that it was in any case a payment of an income nature. It was, he said, a fluctuating payment which “rose or fell with the chances of the business” (quoting Rowlatt, J., in *Jones v. Commissioners of Inland Revenue* (1) (1919), 7 Tax Cas. 310 at p. 315) and it was a payment “for the use” of the sisal potential “as they are using it” (quoting Rowlatt, J., again in *Mackintosh v. Commissioners of Inland Revenue* (2) (1928), 14 Tax Cas. 15 at p. 19). It was therefore, he said, on the authorities an income receipt in the hands of the recipient: and he asked their lordships to hold that it was a revenue expenditure in the hands of the payer.

Their lordships are not disposed to accept this argument. They consider that the cases about income receipts have no relevance here. Payments which are income receipts in the hands of the recipient are not necessarily revenue expenditure in the hands of the payer. Their lordships are concerned here with payments by the company, not receipts by them.

Their lordships prefer therefore to turn back to the words of the Act and ask whether the payments were expenses wholly and exclusively incurred “in the production of the income” of the payer: and this means that you must look at the purpose of the payments. Were they paid in order to acquire a capital asset? or for a capital purpose? If so, they are capital expenditure. But if for an income purpose, they are revenue expenditure. For instance, if a price is paid for freehold land, or a premium (properly so called) is paid for a long lease, it is not an expense incurred in the production of income, but in the production of capital. It is not deductible as revenue expenditure, no matter whether the price or premium is paid by a lump sum or by instalments. And this is true even when the lease is of a wasting asset, such as a coal mine, see *Mallett v. Staveley Coal and Iron Co. Ltd.* (3) (1928), 13 Tax Cas. 772, at p. 778 by Rowlatt, J. Again, if a manufacturer expends money on machinery or plant which is used again and again in his manufacturing operations, it is capital expenditure, and is not deductible in assessing his income, no

matter whether he pays for it cash down or by instalments. But if a trader pays money for

trading stock which he means to sell to customers as soon as he can, it is an expense incurred in the production of income, no matter whether it is paid in a lump sum or by instalments: and it is deductible. Likewise with a rent, properly so called, which is paid for a lease out of which the lessee gets an income. It is a revenue expenditure and deductible.

Applying this reasoning, their lordships ask whether these payments amounting to £174,600 were paid for a capital asset or capital purpose: and the answer, even on the documents which passed during the negotiations, is that they were paid for a capital asset or at any rate for a capital purpose. It is obvious, of course, that the yearly rental of Shs. 2/- an acre (which represented the unimproved value of the land) was paid for an income purpose. But the premium of £311,000 and the royalty of £174,600 were, according to the catalogue, together payable:

“for the unexhausted improvements on the land, including leaf, building, machinery and equipment.”

In the important letter of September 30, 1950, the premium and the royalty are taken together as representing the “total net capital value” of the estates as is shown by the table set out therein:

<i>“Estate</i>	<i>Total Net Capital Value</i>	<i>Premium Payable</i>	<i>Balance due on Royalty</i>	<i>Fibre Tonnage on which Royalty Payable</i>
Lanconi	£191,500	£121,200	£70,300	7,809 Tons
Mjesani	£294,100	£189,800	£104,300	11,588 Tons”
which come to	£485,600	£311,000	£174,600	19,397 Tons

In that table the premium and royalty, added together, make up the “total net capital value” and are obviously paid for the capital asset represented by ninety-nine years right of occupancy of the unexhausted improvements. Whether that right be properly called a lease does not matter. It is a long enduring interest which is of a capital nature: and the payment for it is a capital expenditure. It is true that in some circumstances a reduced amount is payable. The tonnage liable to royalty, as the table says, was only 19,397 tons: and on that tonnage it takes a royalty of £9 a ton, or just over, to make up £174,600. So that if the royalty averaged less than £9 a ton for the 19,397 tons, the total sum payable would be less than £174,600. But the fact that a reduced amount is payable in certain circumstances does not alter the nature of the payment. It is still a payment for a capital asset and must be reckoned as capital expenditure.

On this view the formal contract did no more than express the true nature of the payments. It made explicit that which was previously obscured by the use of the word “Royalty”.

The only way in which the payments of £174,600 might be said to be an income expenditure would be if they were payments made in respect of the actual leaf potential on the estates at the time of disposal. Now we know what the estimated leaf potential was. It was 19,397 tons. Mr. Carson, a director of Ralli Estates Limited, said that the 19,397 tons was:

“an estimate of the line fibre growing on the estate which would be recovered from the mature and immature sisal growing on the estate at the time of sale.”

If the royalty of £174,600 was paid in respect of this tonnage, it would look as if the royalty was a true

royalty payable on the fibre which could be got out of the plants growing on the estates at the time of the sale (just like sand out of a pit) but with a maximum of £174,600. The company would then be

paying for the use of the leaf as they used it. But the company is not in a position to put forward an argument on this footing. There is no evidence to show that the sums amounting to £174,600 were paid in respect of the 19,397 tons. Mr. Carson himself said in evidence: "I did not know how the £174,600 was arrived at": and when Mr. Wood (who was the secretary of the committee which valued the estates) was called to say how the £174,600 was arrived at, the company objected and no evidence was given upon it. So we must take it that the £174,600 was simply part of the one composite payment of £485,600 (£311,000 plus £174,600) payable for the total net capital value. It is on a par with the premium. In short it is part of the purchase moneys for a capital asset. It is therefore a capital expenditure and not deductible.

Their lordships have considered the Land Laws of Tanganyika to which Mr. Bechgaard referred, but even assuming that a right of occupancy is different from a lease, and accepting the special interest which an occupier has in unexhausted improvements, they see nothing in those laws to affect the general question of capital or revenue expenditure which they have discussed.

Their lordships find themselves in agreement with the decision of Crawshaw, J., and of the Court of Appeal for Eastern Africa. They will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs.

Appeal dismissed.

For the appellants:

R Borneman QC (of the English Bar), *K Bechgaard QC* (of the Kenya Bar), and *CN Beattie* (of the English Bar)

For the respondent:

HH Munroe QC and *P Shelbourne* (both of the English Bar)

For the appellants:

Solicitors: *Freshfields*, London

For the respondent:

Charles Russell & Co, London

Tanganyika Transport Co Limited v Ebrahim Nooray [1961] 1 EA 55 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	25 February 1961
Case Number:	80/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA
Appeal from:	H.M. High Court of Tanganyika—Biron, Ag. J

[1] Libel – Evidence – Publication – Letter – No evidence of publication given for plaintiff – Publication admitted by agent of defendant – Whether publication proved.

[2] Libel – Defamatory words – Reflection on plaintiff in way of his business – Letter – No evidence of defamatory interpretation of letter by recipients – Whether plain meaning sufficient to prove defamation.

[3] Libel – Malice – Defamation by officer of limited company – Liability of company for servant's malicious libel – Damages.

[4] Damages – Libel – Assessment – Liability of company – Liability to pay vindictive damages – Malice of company's servant.

Editor's Summary

The respondent, a carrier with a small business of passenger buses, sued the appellant company, which had a large transport business, for damages for libel. A director of the appellant company had written on behalf of his company to the respondent alleging that in contravention of the respondent's licence one of the respondent's passenger vehicles had taken a load of cargo from Lindi to Dar-es-Salaam. Copies of the offending letter were sent by the appellant company to the Tanganyika Transport Authority and the police. The trial judge held that the allegations of the company had not been proved so as to establish justification, that the words used were a libel upon the respondent in the way of his business and imputed a criminal offence to the respondent and that although the occasion was privileged the appellant company was actuated by malice. The judge accordingly awarded the respondent Shs. 20,000/- damages. On appeal the main points taken for the appellant company were that as no evidence had been called from the transport authority or the police, neither publication nor a defamatory interpretation of the letter by the recipients of copies had been proved and that the appellant company as a corporation could not be guilty of malice. The appellant company further submitted that it was not liable for vindictive damages because of the malice of its agent.

Held –

- (i) it was implicit in the allegation that the respondent carried cargo, that he did so for hire or reward which would be an offence under s. 9 (1) of the Transport Licensing Ordinance; the letter was thus a libel on the respondent in the way of his business.
- (ii) the director of the appellant company who had written the letter had said in evidence that he had written to the plaintiff, the secretary of the authority and the police; this was a clear admission of publication, and as regards interpretation whilst it might have been better to call a witness from the authority, the plain meaning of the letter was obvious on its face and required no explanation.
- (iii) a corporation is clearly liable for a malicious libel published by its servant acting in the course of his employment. *Citizens Life Assurance Co. Ltd. v. Brown*, [1904] A.C. 423 applied.

- (iv) there was ample evidence of express malice; in the circumstances it was difficult not to conclude that the allegations were false to the knowledge of the writer and the appellant company was responsible for the malice of a senior director.
- (v) in awarding Shs. 20,000/- damages, the trial judge had recognised that the respondent's sole means of livelihood were threatened; the libel must have caused the respondent very great distress of mind and whilst there was no reason to assume that the damages were awarded as vindictive, the judge would not have been acting on a wrong principle if he had done so, since the company and its director were joint tortfeasors.

Appeal dismissed.

Cases referred to:

- (1) *Citizens Life Assurance Co. Ltd. v. Brown*, [1904] A.C. 423.
- (2) *Campbell v. Paddington Corporation*, [1911] 1 K.B. 869.
- (3) *Poulton v. London and South Western Railway Co.*, L.R. 2 Q.B. 534.
- (4) *Adam v. Ward*, [1917] A.C. 309.
- (5) *London Association for Protection of Trade v. Greenlands Ltd.*, [1916] 2 A.C. 15.
- (6) *Rook v. Fairrie*, [1941] 1 All E.R. 297.

February 25. The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes V-P: This is an appeal from a judgment and decree of the High Court of Tanganyika whereby the appellant company was ordered to pay to the respondent/the original plaintiff, the sum of Shs. 20,000/- as damages for libel, together with Shs. 4,629/75 the taxed costs of the suit.

The appellant company is a private limited liability company having its registered office in Dar-es-Salaam and carrying on a very considerable business as public carriers of passengers and merchandise in Tanganyika. The respondent is a "transporter and carrier of passengers and their personal luggage" carrying on a small business of passenger buses at Dar-es-Salaam and in the districts of Lindi, Masasi and Newala in Tanganyika. The carriage of passengers and goods by road for hire or reward in Tanganyika is controlled by the Transport Licensing Ordinance (No. 13 of 1956 (now Cap. 373) hereinafter referred to as "the Ordinance") and regulations made thereunder. The respondent at the material time held a "Road Service Licence" issued under s. 10 of the Ordinance.

It may be mentioned here that Mr. Roden for the appellant company took exception to a statement in the learned trial judge's judgment where he said:

"It is common ground that the plaintiff holds a road service licence and is not authorised to carry goods on his vehicles."

Mr. Roden contended that it was never conceded by the appellant company that that was the effect of the respondent's licence. Whether or not that is so—and it does appear to me that the trial proceeded on the basis that the respondent was not authorised to carry cargo in his buses, even if this was not expressly

conceded—it appears immaterial since it is clear that a road service licence only authorises the carriage of passengers and their baggage (s. 10 (4) of the Ordinance), and that therefore under s. 9 of the Ordinance the carriage of goods, as distinct from passengers' baggage, by the respondent for, *inter alia*, hire or reward was prohibited.

The libel complained of was contained in a letter dated July 26, 1958, signed by a Mr. Amin, who was senior director of the appellant company, which reads as follows:

“Ref. No. 26–7/1/58
D’Salaam 26th July 58.
M/S Ebrahim Nooray,
P.O. Box 106,
Lindi.

Ref: Your Passenger Bus R.S.L. A/00 36/57

Dear Sirs,

It has been brought to our notice that your Passenger Bus having a R.S.L. No. A/0036/57 was loaded with cargo from Lindi to D’Salaam. Your bus was seen in DSM on Monday 21st inst. loaded with cargo from Lindi.

We have to bring to your notice that under the regulations of T.L.A. you are not allowed to load in a vehicle having a R.S.L., and as such we have to request you not to load cargo in your passenger buses.

Thanking you.

Yours faithfully,

(sgd) S. C. Amin.

For Tanganyika Transport Co. Ltd.

Senior Director.

Copy to: The Secretary,
Tanganyika Transport Authority,
DSM.

- ” The Officer i/c
Police Lindi.
- ” T.T. Co. Ltd., Lindi.”

The innuendo averred by the respondent in para. 5 of the plaint was that:

“By the said words the defendant meant and was understood to mean that the plaintiff was contravening the conditions of his license and was guilty of an offence under s. 26 (1) of the Transport Licensing Ordinance No. 13 of 1956 and as such was not a fit and proper person to be granted a similar license in future.”

And the respondent claimed that in consequence he had been seriously injured in his character, credit and reputation in the way of his business, had been brought into public scandal, odium and contempt, and had suffered damage.

At the commencement of the trial issues were agreed as follows:

- “1. Whether the words quoted in para. 4 of the plaint were true in substance and in fact.
- “2. Whether the said words constituted a libel of the plaintiff in the way of his business of transporter.
- “3. Whether the said words contained an imputation that the plaintiff had committed a criminal offence.
- “4. Whether the publication of the said words comes within the defence of qualified privilege.
- “5. If the answer to issue 4 is in the affirmative, whether there was malice in the publication of the said words by the defendant company.

“6. Whether the plaintiff is entitled to general damages and if so how much.”

The learned judge’s findings on these issues were:

1. That the appellant company failed to establish justification.
2. That the words complained of did constitute a libel of the respondent in the way of his business as transporter.
3. That the said words contained an imputation that the plaintiff committed a criminal offence.
4. That the occasion on which the libel was published was privileged.
5. That the defence of privilege was destroyed by the malice of the “defendants”.
6. That the respondent should receive Shs. 20,000/- as damages.

Mr. Roden argued the appeal on the basis of the agreed issues, dealing with them, as had the learned judge, in four sections, namely issue 1, issue 2 and issue 3, issue 4 and issue 5, and issue 6. It is convenient to follow the same approach in this judgment.

As to issue 1, that is, the plea of justification, although the learned judge’s finding is disputed in the memorandum of appeal, Mr. Roden at the hearing abandoned this contention, conceding that there was evidence on which the learned judge could reach his finding on this issue. The learned judge’s conclusions on this issue are, however, relevant to the issue of malice, and I therefor mention them shortly.

Two witnesses for the appellant company, Mr. Amin whom I have already mentioned, and a Mr. Akberali Kassam who, at the material time, was a clerk employed by the appellant company, gave evidence of having seen one of the respondent’s buses in Dar-es-Salaam on July 21, 1958, loaded with goods. The witnesses were insistent on the date and would not admit the possibility of a mistake. In fact, there was virtually conclusive evidence, arising from the registers kept at the ferries at Kilindini and Utete, to establish that no vehicle belonging to the respondent was in Dar-es-Salaam on July 21, 1958, and it was accepted as such by the learned judge. The learned judge, however, went on to consider whether the appellant company’s witnesses might have seen the respondent’s bus in Dar-es-Salaam loaded with goods a day or two earlier when one of his buses was in Dar-es-Salaam. The learned judge was satisfied they had not done so, accepting on this point the evidence of a Mr. Sadrudin who had been a passenger in the bus saying:

“It would be an understatement to say that I prefer his evidence, which supports that of the plaintiff, to that of both Mr. Amin and Mr. Akberali.”

The finding of the learned judge on the first issue as phrased i.e. that the appellant company had “failed to establish justification”, is therefore also something of an understatement. The learned judge’s conclusions amounted to positive findings that the statements in the letter of July 26, 1958, and the evidence given by Mr. Amin and Mr. Akberali were false.

As regards issue 2 and issue 3, Mr. Roden argued, as I understood him, that the plaintiff alleged that the letter of July 21, 1958, meant that the respondent:

“was contravening the conditions of his licence and was guilty of an offence under s. 26 (1) of the Transport Licencing Ordinance”;

that the allegations in the letter are, in effect (a) the carrying of goods; and (b) non-compliance with schedule; that neither has been shown to be a condition of the respondent’s licence; that the respondent was at liberty to vary his schedule as he chose; that the carrying of goods was not a breach of s. 26 (1)

of the Ordinance; that if it were a breach of any provision of the Ordinance it would be a breach of s. 9 (1); that the letter could not be said to impute an offence against that section as there was no allegation that the goods had been carried for hire or reward; that it was not pleaded or found that an offence under that section was alleged; that no witness from the Tanganyika Transport Licensing Authority or the police, Lindi, had been called; that the letter, exhibit p. 10, dated July 31, 1958, which purported to be from the Transport Licensing Authority to the respondent, written in consequence of the letter of July 26, 1958, and conveying a warning to the respondent, was not evidence of its contents; that there was therefore no evidence of publication of the letter or of the interpretation of the letter by the recipients; and that therefore the learned judge should not have found for the respondent on issue 2 and issue 3.

In my opinion there is no substance in these arguments. The letter of July 21, 1958, is on the face of it a libel on the respondent in the way of his business. It is implicit in the letter that the allegation is that the “cargo” is being carried in the way of business, that is, for hire or reward. That would undoubtedly be an offence under s. 9 (1) of the Ordinance. The fact that it was mistakenly pleaded to be an offence under s. 26 (1) of the Ordinance is, to my mind, immaterial. It is clear that a criminal offence under the Ordinance was being alleged, and it has not been suggested that the error in pleading has resulted in any prejudice whatever to the appellant company. Were it necessary to do so I would allow an amendment of the pleadings even at this stage to correct the error, but I do not think it is necessary. The essential matter is that the letter was alleging the commission of an act by the respondent, in relation to his Road Service Licence, which was an offence under the Transport Licensing Ordinance, and I think that this has been sufficiently pleaded. So far as non-compliance with the scheduled time-table is concerned, it was not made clear to me just what was the sanction, if any, for compelling adherence to the timetable. But, accepting, as alleged by Mr. Roden, that there is no such sanction, the allegation of irregularity is still one calculated to damage the respondent’s interests in his relations with the Transport Licensing Board.

As regards publication of the letter, Mr. Amin in evidence stated:

“On July 26, 1958, I wrote a letter to plaintiff—the Secretary Transport Licensing Authority—Officer i/c Police and my company.”

This was a clear admission of publication. So far as interpretation is concerned, it might have been better to call a witness from the Transport Licensing Authority, and it may be that the letter from the authority of July 31 is not evidence of the truth of its contents, but the plain meaning of the letter of July 26 is obvious on its face and requires no explanation of how it would be understood by a particular recipient.

As to issue 5, Mr. Roden argued that the appellant company, being a corporation, could not itself be guilty of malice, but could only be vicariously liable for the malice of its agent, that is to say, of the writer, Mr. Amin; that there was no express finding in the judgment that the allegations were false and it was not considered whether they were false to the knowledge of the writer; that the reasons for the finding of malice were the writing of three letters of complaint about the respondent’s business within a short period of each other, the failure of the appellant company to reply to the letters of the respondent’s advocates, and the conduct of Mr. Amin in the witness-box; that only the letter complained of emanated from Mr. Amin, and that the other letters could not be taken into account to show malice on his part; that likewise the failure to reply to the respondent’s advocates could not indicate malice on the part of Mr. Amin; and that Mr. Amin’s conduct in the witness-box was not such as to justify a finding of malice against him.

It is, of course, clear that a corporation is liable for a malicious libel published by its servant acting in the course of his employment—*Citizens Life Assurance Company Ltd. v. Brown* (1), [1904] A.C. 423. It is by no means clear to me that a corporation could not itself be deemed to be guilty of malice where an act of the corporation done by an officer of the corporation or authorised by its governing body is malicious. I have not found direct authority on the point, but Lord Lindley's dicta at p. 426 of the report of the *Citizens Life Assurance Company* (1) case seems to suggest that a corporation would be fully liable for a libel published by an officer or servant. In *Campbell v. Paddington Corporation* (2), [1911] 1 K.B. 869 Lush, J., said (at p. 877 and p. 878):

“The second contention was that the act of the defendants was illegal and that therefore the only persons to be sued in respect of it are those individuals who authorised it.”

Lush, J., then referred to the case of *Poulton v. London and South Western Railway Company* (3), L.R. 2 Q.B. 534, and continued:

“That case was only an illustration of the principle that where the wrongful act is done without express authority of the corporation, an authority from the corporation to do it cannot be implied if the act is outside the statutory powers of the corporation . . . The resolution [i.e. the resolution in the case which Lush, J., was considering] was the resolution of the corporation, and the act which caused the damage, no matter for whose benefit it was done, was the act of the corporation and not of the individual councillors who resolved to do it. Therefore there are no grounds for saying that the defendants are not responsible for it.”

It is true that that case was not a libel case, but if an act of a corporation should happen to be malicious I do not see why they should not be responsible for it. This, indeed, seems to be assumed by Lord Dunedin in *Adam v. Ward* (4), [1917] A.C. 309, when he says (at p. 331):

“For my own part I fail to see how, if it was once shown that Sir Edward Ward was merely obeying orders when he signed the statement drawn up by the Army Council and sent it for publication, and was relying, as he was entitled to do, on the privilege which attached to the action of his superior and principal, the Army Council, any evidence as to malice on his part could be relevant. It is not necessary, however, to decide that question. It is only necessary to add that there is not a shred of evidence of malice on the part of the Army Council.”

However that may be, I am of opinion that there was ample evidence in the instant case to support a finding that there was express malice on the part of Mr. Amin. I have already indicated that, in my view, the learned judge's findings of fact amounted to a positive finding that the statements in the letter of July 26, 1958, were false, and I do not think the learned judge was unmindful of this in considering the question of malice. In the circumstances in which the statements were written it is difficult to refrain from the conclusion that they were false to the knowledge of the writer. The letter was written a few days after the alleged incident when there should have been no confusion as to the date, especially as it was alleged that two different persons had witnessed the incident; yet it happened that the respondent was able to establish that no vehicle of his could have been at the scene of the alleged incident on that date. We did not have the advantage of seeing Mr. Amin in the witness-box, but it is clear that his demeanour impressed the learned judge most unfavourably. It is true, as pointed out by Mr. Roden, that at the time Mr. Amin gave his evidence the evidence as to the ferry tickets and entries in the ferry registers

had not yet been given. Nevertheless the existence of the ferry registers was brought to Mr. Amin's notice in cross-examination, and he refused to concede that there might have been a mistake on his part. I think the learned judge was entitled to have regard to his demeanour, and I should be reluctant to conclude that the learned judge had taken a wrong view of Mr. Amin as a result of his observation of him in the witness-box. As regards the letters, it may be the learned judge unduly stressed them, but I think he was entitled to take them into account. The respondent's case was that the appellant company (which, it is to be noted, is a private company) was pursuing a deliberate policy of raising a cloud of suspicion around the respondent which would result eventually in the withdrawal of, or refusal to renew, his licence, and so remove him from a state of competition with the appellant company. In support of this I think he was entitled to refer to other complaints made by the appellant company regarding the respondent's conduct of his business. Mr. Amin, after all, is a senior director of the appellant company and no doubt would be a party to any such policy, if it existed.

As I have said, I think there was ample evidence to support a finding of malice on the part of Mr. Amin. The appellant company is responsible for such malice.

As regards the last issue, damages, Mr. Roden argued that in assessing damages the learned judge had obviously taken malice into account and awarded some part of the damages as vindictive damages; and that a corporation could not be liable to vindictive damages for the malice of its agent. He based his argument on a passage in *Arnold on Damages and Compensation* (2nd Edn.) at p. 21 (and subsequently twice repeated in substance) which is as follows:

"In cases of joint tort each tortfeasor is liable for the entire damage inflicted. The question as to the assessment of damages against two or more joint tortfeasors is dealt with in a subsequent chapter. Here, it may be observed that a principal is not responsible for the malice of his agent, so as to be liable to vindictive damages, though he may be responsible for the wrongful acts committed by the agent, who was, in fact, actuated by malice".

The learned author bases the proposition in the last sentence of the passage quoted on an Irish case and a Scottish case which unfortunately are not available here. I cannot find that the cases in question are referred to in either *Gatley on Libel and Slander* (3rd Edn.), *Fraser on Libel and Slander* (7th Edn.) or in the sections of *Halsbury's Laws of England* (3rd Edn.) dealing with Libel and Slander, and Damages, and the proposition does not appear to be stated in those works. In the instant case the publication was an act of the appellant company by its officer, Mr. Amin, and, although the appellant company alone was sued, it is, I think, clear that Mr. Amin and the appellant company were joint tortfeasors. In that case I think the principle expressed in the first sentence of the passage quoted from *Arnold* applies. This would appear to be supported by the dicta of Lord Atkinson in *London Association for Protection of Trade v. Greenlands, Limited* (5), [1916] 2 A.C. 15 at p. 31 where he says:

"The late Lord Chief Justice had told the jury that there was no evidence of malice against the defendants other than Wilmshurst, but that they might when they came to assess damages take into consideration whether the former were lax in their conduct in publishing the libel. Upon these findings the Lord Chief Justice entered judgment against the society and Hadwen for 1000 l. and costs, and against Wilmshurst for 750 l. and costs. In the course of the discussion, Sir E. Clarke, who appeared for the plaintiffs, said:

‘My lord, I ought to mention, so as to avoid any difficulty hereafter, that your lordship has said there is no evidence of express malice against the society and Hadwen. I agree, if that were taken alone, but the point that the malice has been found against Wilmshurst affects them’; and the Lord Chief Justice replied: ‘I indicated that, and I mentioned the case in which I think I am right in saying Dunn was the name of the agent. The defendants were held liable for the libel published by their malicious agent.’

“The findings of the jury must, I think, mean that the publication of the letter of April 2, 1910, to Kydd was the joint act of the three defendants, the association being treated as a legal entity suitable at law, which again must mean that Wilmshurst sent his report to Hadwen with the knowledge and intention that it would be communicated to the inquirer. If so, each of the three defendants was a joint tortfeasor, and being that they were jointly and severally responsible for the wrong done, and for the entire damage sustained.”

In fact, in the instant case, it is by no means clear to me that the learned judge did award vindictive damages. He said:

“There remains only to consider the sixth and final issue:

‘Whether the plaintiff is entitled to general damages and if so how much.’

“There can be no question at all that the plaintiff is entitled to damages. With regard to the quantum of such damages, however, it is very difficult to assess a suitable figure. The defendant company, compared with the plaintiff, is in a very big way of business as transporters. The company has more than seventy vehicles to the plaintiff’s four. It would be no exaggeration to describe it as a case of a Goliath trying to squeeze out of business a rival David, or at least do him as much harm as possible.

“The plaintiff’s sole means of livelihood is this transport business, in which he has invested considerable capital, which would be greatly depleted were he driven out of business and forced to sell his vehicles. Nor is the running of the business by him an easy or soft occupation. In fact, it appears to be a hard life, as he is apparently on the road nearly every day of the week and spends most nights away from home. It is extremely difficult to assess a proper figure for damages, and whatever figure one arrives at, there are bound to be contrary opinions and criticisms that the figure is either too low or too high.

“I can only adjudge what I consider to be a reasonable sum as damages. In all the circumstances of this case, I consider that a reasonable sum as damages would be Shs. 20,000/-.”

A libel such as the instant one must have caused the respondent very great distress of mind. As the learned judge said, his sole means of livelihood was threatened by a libel of a type which raised suspicions against him which were extremely difficult to dissipate. But for the fortunate circumstance of being able to establish the whereabouts of his vehicles by means of the ferry registers, he might not have been able to remove the suspicion attaching to him. The distress of mind which he must have endured certainly justified substantial compensation, and, though the learned judge does not refer to it in terms, it seems to me that it is this which he has in mind in the passage of the judgment which I have set out. For this reason I am not prepared to assume that the learned judge intended any part of the damages as vindictive damages, but even if he did so, I do not think he was acting on a wrong principle since I take

the view that the appellant company and Mr. Amin were, in the circumstances of this case, joint tortfeasors.

As stated in *Rook v. Fairrie* (6), [1941] 1 All E.R. 297, the latitude in awarding damages in an action for libel is very wide, and the one thing a court of appeal must avoid doing is to substitute its own opinion as to what it would have awarded for the sum which has been awarded by the judge below. In the instant case I do not think the learned judge has proceeded on any wrong principle, and I am not prepared to say that the amount awarded is so manifestly excessive that this court ought to interfere.

For the reasons given I would dismiss this appeal with costs.

Sir Kenneth O'Connor P: I agree. The appeal will be dismissed with costs.

Gould JA: I also agree.

Appeal dismissed.

For the appellant:

Adrian Roden

For the respondent:

PR Dastur

For the appellant:

Advocates: *Adrian Roden*, Dar-es-Salaam

For the respondent:

PR Dastur, Dar-es-Salaam

Rosetta Cooper v Gerald Nevill and another [1961] 1 EA 63 (PC)

Division:	Privy Council
Date of judgment:	9 March 1961.
Case Number:	40/1959
Before:	Lord Tucker, Lord Denning and Lord Morris of Borth-Y-Gest
Appeal from:	E.A.C.A. Civil Appeal No. 38 of 1958 on appeal from H.M. Supreme Court of Kenya—Miles, J

[1] *Judgment – Evidence – Negligence – Mistake – Swab left in patient's body – Emergency operation – Finding unsupported by evidence – Validity of finding.*

Editor's Summary

On February 1, 1956, the appellant underwent an emergency abdominal operation at Nairobi. She had arrived at the hospital comatose and pulseless but through the skill and efforts of the surgeon and hospital staff her life was saved. Ten months later after experiencing acute pain she underwent another operation by another surgeon when a surgical swab was found in the bowel. Subsequently the appellant and her husband sued the respondents alleging negligence in leaving the swab in her body. The respondents denied that they had been negligent or that any swab had been left in the appellant's body during the February operation. They suggested it might have been left there during an earlier operation in January, 1955. The trial judge held that the swab was left in the appellant's body at the time of the operation on February 1, 1956, and, since the surgeon had in evidence conceded that if it had been so left, which he denied, he would have been negligent, the judge found for the appellant and awarded her and her husband damages. On a first appeal by the respondents the finding of negligence against the surgeon was reversed on the ground that the swab might have been left in the appellant's body by a mistake for which the surgeon was not responsible. On further appeal.

Held – it was not open to the Court of Appeal to adopt a speculative explanation (of the presence of the swab) without any evidence to support it.

Appeal allowed. Judgment of the Court of Appeal set aside.

Judgment of the Supreme Court of Kenya restored.

No cases referred to in judgment

Judgment

Lord Denning: On February 1, 1956, Mrs. Cooper underwent an abdominal operation in the Nairobi European Hospital. A swab was left inside her, and was removed on November 1, 1956. On June 29, 1957, Mrs. Cooper and her husband sued the surgeon, Mr. Nevill, and the hospital authorities, the Kenya European Hospital Association, for negligence. On February 17, 1958, the trial judge (MILES, J.) found against both defendants. He awarded special damages to both Mr. and Mrs. Cooper and also general damages to Mrs. Cooper amounting to Shs. 50,000/- (that is, £2,500) and ordered the defendants to pay the costs. Both defendants appealed. On November 24, 1958, the Court of Appeal for Eastern Africa (Briggs, V.-P., Gould, J.A., Corrie, Ag. J.A.) allowed the surgeon's appeal and entered judgment for him. They upheld the finding against the hospital authorities but reduced the general damages from Shs. 50,000/- to Shs. 15,000/- (that is, £750). They made consequential orders as to costs. Mrs. Cooper now appeals to their Lordships' Board.

The history starts with a previous operation on Mrs. Cooper. She had been anxious to have children but, owing to some obstruction, was unable to have any. On January 24, 1955, she went into the Princess Elizabeth Hospital, Nairobi, and was operated on by a surgeon, Mr. Preston. He removed the blocked parts and inserted new. The operation was successful. She afterwards conceived a child, but unfortunately, on February 1, 1956, when she was three-and-a-half months' pregnant, she suffered a very severe internal haemorrhage. It was due to what the doctors call a "ruptured ectopic pregnancy". She was taken to the Nairobi European Hospital, where she arrived almost dead, pulseless and grey-blue in colour. And there, by the most remarkable efforts of all concerned at the hospital, her life was saved. It is worthy of the highest praise. Everyone did well, but the greatest credit was due, one would think, to Mr. Nevill, the surgeon. It was he who found the rupture in the uterus and stopped the bleeding. It was his dexterity and speed that made the difference between life and death.

It must here be noticed that Mr. Nevill was not the servant or agent of the hospital authorities. Mr. and Mrs. Cooper employed him and his assistant (Dr. Wilson) themselves. The hospital authorities provided the theatre sisters and nurses and other facilities.

Two or three months later Mrs. Cooper suffered severe pains inside. Her doctor thought it was adhesions. He admitted her to a nursing home for observation for a day or two but could not find the cause. She continued to have very severe pain. "It was a long nightmare," she said, "I thought it might be cancer". In October she was admitted to the European Hospital again. She was so depressed that she actually thought of committing suicide and was only stopped by a nurse. Eventually the X-rays showed an intestinal obstruction. On November 1, 1956, she was operated on by a surgeon, Mr. Barber. He found much of the bowel inflamed and had to cut away seven feet of it. And inside this piece of bowel there was found a piece of towelling material some nine or ten inches long and seven or eight inches wide—just the sort of material which is used in hospitals as a swab. Mr. Barber rang up Mr. Nevill and told him what he had found. He also told Mr. Cooper. Mrs. Cooper gradually recovered. She still has some pains, but not of the same intensity. They are

presumably due to adhesions. The doctors do not think it would be wise for her to attempt to have a child now. That is not because of the swab but because of the grievous trouble she had when she previously become pregnant. It would not be wise to risk the same again.

Mr. and Mrs. Cooper decided to sue Mr. Nevill and the hospital authorities, claiming damages for negligence in leaving a swab inside her body. In defending the action, Mr. Nevill and the hospital authorities firmly asserted that it was not their swab at all. No swab, they said, was left in Mrs. Cooper's body when Mr. Nevill operated on her in February, 1956. It must have been left when Mr. Preston operated on her in January, 1955. This was a difficult defence to establish because, according to the medical evidence, symptoms would appear within a few weeks or a few months, and here well over twelve months had elapsed since Mr. Preston's operation, whereas only a few months since Mr. Nevill's. Miles, J., negatived the contention.

"I see no escape," he said, "from the conclusion that this pack was left in Mrs. Cooper's body at the time of the operation performed by Mr. Nevill".

Mr. Nevill and the hospital authorities appealed to the Court of Appeal for Eastern Africa. They again put in the forefront of the appeal that it was not their pack. But the Court of Appeal affirmed the trial judge on the point. And with two concurrent findings of fact on the point, it is no longer disputed.

But this line of defence left an indelible impact on the rest of the case. In order to show it was not their swab, both Mr. Nevill and the staff of the hospital were at pains to show that they took so much care that no swab could possibly have been left in her body unawares. To take five specific points made by them:

- (1) There was no chance of a mistake being made on the "check-in" of the swabs, as, for instance, by reason of one being stuck to another. Sister Molloy said: "Packs are made up in bundles of three. There are always three. A bundle has never contained four to five packs to my knowledge. One of the sisters rolls up the packs. It has never happened that four packs have been rolled up."
- (2) There was no chance of a restraining (or packing) swab being left in Mrs. Cooper's body. "It is my duty," said Mr. Nevill, "to see that there is a clip attached to every pack used for restraining purposes . . . I personally removed them. I removed them by catching the actual swab. I wouldn't have needed any guidance to the swab, they were quite obvious."
- (3) There was no chance of a mopping swab being left in Mrs. Cooper's body. "At the mopping stage," said Mr. Nevill, "you would not leave them in the body, you don't let go . . . no mopping swab left my hand at this operation. I cannot say that a mopping swab never left my assistant's hand. It would be an improper thing to happen as a general rule. In this operation it would not have been necessary. I never observed Dr. Wilson letting go a mopping swab."
- (4) Mr. Nevill carried out his routine check before sewing up. "This is not a case which made the routine check impossible. By the time for sewing up, Mrs. Cooper was very relatively better."
- (5) There was a check-out of the swabs and a re-check; and the count was found to be correct on both. "We re-checked," said Sister Banks, "because the packs were still in the theatre and because of the large number that were used. When we did this final check we had no doubt at all as to whether our original check had been correct."

Now once it is held that a swab was left in the body, some of those points break down. There must have been some mistake made both by Mr. Nevill and the hospital authorities. So far as Mr. Nevill is concerned there must

have been a swab left by him or his assistant, either a restraining swab or a mopping swab. So far as the hospital authorities are concerned, there must have been a mistake either on the check-in or the check-out.

Although there must have been some mistake, it does not follow there was negligence. The whole team were engaged in a race against time. They were under extreme stress. A mistake which would amount to negligence in a “cold” operation may be no more than a misadventure in a “hot” one. Mr. Thompson urged their lordships to accept this as the explanation here. But the difficulty is there is no evidence to suggest what kind of mistake this would be: for the simple reason that it was inconsistent with the defendants’ case for them to admit of any mistake at all. This difficulty so much impressed Miles, J., that he could not see his way to overcome it.

“It seems to me,” he said, “that the conditions which might reasonably excuse a surgeon overlooking a pack were excluded by Mr. Nevill in his evidence.”

He found him to be negligent in leaving a swab and the hospital authorities negligent in making a wrong count.

The course taken at the trial may thus be summarised in a few sentences: Mrs. Cooper said: “A swab was left in my body. I ask the judge to infer negligence”. Mr. Nevill said:

“No swab was left in your body. I took every possible care so that none should be left,”

and he added in effect:

“It would have been negligent for me or my assistant to leave one in: and we were not negligent.”

To which the judge found:

“A swab was left in her body. So Mr. Nevill is convicted out of his own mouth of negligence.”

The judge used, indeed, that very phrase.

But the Court of Appeal while upholding the finding against the hospital authorities reached a different conclusion with regard to Mr. Nevill. “The only probable source of error disclosed in the evidence,” said Briggs, V.-P.,

“is that one of the bundles (on the incoming count) contained, not three, but four packs . . . It appears to me that two old and thin packs, with the tape of one between them, might easily feel and look like one fairly new and thick one and might be miscounted in haste . . . If two packs were handed together to Mr. Nevill or Dr. Wilson, and if a corner of one as well as its tape was folded inwards, and if the surgeon’s grip was only on the corner of one, it would seem possible that the other might detach itself unseen as it became wet in the body and might never have been seen again.”

Whilst their lordships fully appreciate the reluctance of any tribunal to arrive at a finding of negligence against a highly skilled surgeon who has successfully performed a most difficult operation, they feel bound to say that it was not open to the Court of Appeal to speculate in this way without any evidence to support it. This possibility of two packs being stuck together was never suggested as an explanation by anyone. The only evidence on the point (that of Sister Molloy) was that it had never happened. If this possibility had been put to Mr. Nevill, he might have rejected it, and given good reasons for rejecting it.

Their lordships find that the trial judge was justified in his finding:

“To sum up,” said Miles, J., “if the pack was a mopping pack, it was negligence on the part of the person who used it, whether it was Mr. Nevill or Dr. Wilson, to lose control of it and leave it in the body. If it was a restraining pack, having regard to the small number used and their obvious position, the absence of movement and the lack of any particular need for haste at the conclusion of the operation . . . it was negligence on the part of Mr. Nevill not to remove it, the responsibility being, as he admits, upon him to do so, and there being no justification for the departure from the normal routine.”

Their lordships are of opinion that the Court of Appeal ought not to have reversed the trial judge on this point.

There remains the question of damages. Their lordships have felt much difficulty on this score. It is not suggested that the trial judge misdirected himself on the facts or the law. But it is suggested that he made a “wholly erroneous estimate”, and the Court of Appeal have accepted this view. Their lordships think that he may have erred on the high side, but not so much as to make it wholly erroneous. It must be remembered that Mrs. Cooper suffered for months much physical pain, and acute mental distress. She had to undergo a major operation which ought never to have been necessary. She has lost seven feet of her bowel and is left only, said Mr. Barber, with “the borderline amount which might lead to ill effects.” In all the circumstances their lordships do not think it is a case where the Court of Appeal should have interfered with the assessment made by the trial judge.

Their lordships will humbly advise Her Majesty that the appeal should be allowed, the judgment of the Court of Appeal for Eastern Africa set aside, and the judgment of the Supreme Court of Kenya restored. The respondents must pay the costs here and below.

Appeal allowed. Judgment of Court of Appeal set aside. Judgment of the Supreme Court of Kenya restored.

For the appellant:

James Stirling QC and Adrian Hood (both of the English Bar)

For the respondents:

John Thompson QC and Frederick Hallis (both of the English Bar)

For the appellant:

Solicitors: *Merriman, White & Co*, London

For the respondents:

Lovell, White & King, London

LH Lakhani & Co v Henry de Souza
[1961] 1 EA 68 (HCU)

Division: HM High Court of Uganda at Kampala

Date of judgment: 3 March 1961

Case Number: 173/1960
Before: Sheridan J

[1] Rent restriction – Premium – Recovery – Lease for a year with option to renew annually – Whether premium legal – Rent Restriction Ordinance (Cap. 115), s. 3 (2) (U.).

Editor's Summary

The plaintiffs sued for the recovery of a premium of Shs. 20,000/- paid by them to the defendant for the grant of a tenancy of business premises. The agreement provided that the tenancy was to be for one year from April 1, 1954, and renewable annually at the option of the plaintiffs. At the hearing a preliminary point of law was taken by the defendant that even if the premium was paid, which was not admitted, it was legal as a long lease of business premises where the term was for seven years or more and protected by the second proviso to s. 3 (2) of the Rent Restriction Ordinance which was in force at the material date. For the plaintiffs it was submitted that the second proviso could apply only to an original grant of a long lease for a period of not less than seven years.

Held – the premium, if paid, was a legal premium by virtue of the second proviso to s. 3 (2) of the Rent Restriction Ordinance.

Order accordingly.

Cases referred to:

- (1) *Popatlal Hirji v. I. H. Lakhani & Co.* (E.A.) Ltd., [1960] E.A. 437 (U.).
- (2) *Gray v. Spyer*, [1922] 2 Ch. 22.
- (3) *Northchurch Estates Ltd. v. Daniels*, [1947] Ch. 117.

Judgment

Sheridan J: In this suit for the recovery of Shs. 20, 000/- which is alleged to have been paid by the plaintiffs to the defendant as a premium in consideration for the grant of a tenancy, the preliminary point of law has been raised that even if this payment were made, which is not admitted, it was legal in that it was in respect of a grant of a long lease of business premises where the term was for seven years or more and is protected by the second proviso to s. 3 (2) of the Rent Restriction Ordinance (Cap. 115). The payment is alleged to have been made on March 6, 1954, and the proviso was not deleted until the Rent Restriction (Amendment) Ordinance, 1954, came into force on September 30 of the same year.

A copy of the tenancy agreement is annexed to the plaint. Clause 8 provides:

“The tenancy to be for a period of one year from the 1st day of April, 1954, and shall be renewable annually at the Tenant’s option on the above terms and conditions.”

An identical clause was considered by Bennett, J., in *Popatlal Hirji v. I. H. Lakhani & Co. (E.A.) Ltd.* (1), [1960] E.A. 437 (U.) where following *Gray v. Spyer* (2), [1922] 2 Ch. 22 he held that an agreement for a lease which is annually renewable at the option of the tenant is to be construed as a lease for a term exceeding three years. Per Warrington, L.J., at p. 33:

“I am of opinion that the true effect of the agreement was to extend the option, at its date limited to one year, to a succession of years, limited of course by the length of the landlord’s own interest in the premises, but otherwise undefined, and it purported therefore to create a succession of reversionary terms, each for one year certain, provided the requisite notice was given prior to the expiration of each of those terms . . . In my opinion the agreement in question, construed as I think it ought to be, purported to create a term exceeding three years from the making thereof, and was therefore void at law as a lease.”

That case concerned the requirement by the Statute of Frauds for a lease for a term exceeding three years to be in writing. Bennett, J., was concerned with the effect of such a lease which was not in the statutory form and was not registered as is required by the Registration of Titles Ordinance, s. 108 and s. 110 and he concluded that it was enforceable as an agreement to grant a lease in statutory form.

Mr. Wilkinson, for the plaintiffs, submits that the second proviso could apply only to an original grant of a long lease for a period of not less than seven years. In parenthesis I must confess that I do not know what is a “long lease”. The ensuing words of the proviso would seem to render the use of the word “long” redundant and meaningless. It may well have been the intention of the draftsman to grant the exemption from illegality only to premiums paid in respect of initial leases for a period of seven years or more, but, on the authorities to which I have referred above, I am unable to say that this is the effect of the second proviso. The artificial nature of these agreements is illustrated by *Northchurch Estates Ltd. v. Daniels* (3), [1947] Ch. 117 where it was held that such an agreement constituted a grant of a perpetually renewable leasehold as described by para. 7 of Sch. 15 of the Law of Property Act, 1922, and that a tenancy was thereby created for a term of 2,000 years in favour of the tenant. In my opinion this payment, if it was made, was a legal payment by virtue of the second proviso to the Rent Restriction Ordinance.

Order accordingly.

For the plaintiffs:

PJ Wilkinson and BE De Silva

For the defendant:

SA Pinto

For the plaintiffs:

Advocates: *Wilkinson & Hunt*, Kampala

For the defendant:

SA Pinto, Kampala

Mshomba s/o Omoryo v R
[1961] 1 EA 70 (HCT)

Division: HM High Court of Tanganyika at Arusha

Date of judgment: 20 February 1961

Case Number: 138/1960

Before:

Williams J

[1] Criminal law – Practice – Order for payment of compensation and costs to accused by informant – Whether order valid – Meaning of “in addition to his costs” – Criminal Procedure Code, s. 88, s. 173 and s. 175 (T.).

Editor’s Summary

The appellant was a witness on whose information the police had brought a prosecution for arson against an accused. The magistrate acquitted the accused and considering the appellant’s complaint to be frivolous and vexatious ordered him to pay the accused Shs. 500/- compensation and Shs. 500/- costs under s. 175 of the Criminal Procedure Code. On appeal it was argued that as regards the order for payment of compensation “complainant” in s. 175 is synonymous with “private prosecutor” in s. 173 and therefore could not provide for orders against informants to police any more than what s. 173 provides.

Held –

- (i) the words “in addition to his costs” in s. 175 of the Criminal Procedure Code means “in addition to costs awarded under s. 173 of the Code”.
- (ii) section 173 provides for costs to be awarded against a private prosecutor but not against an informant to the police and accordingly the order made against the appellant for payment of the costs was invalid.
- (iii) “complainant” and “private prosecutor” are synonymous for the purposes of s. 88 of the Code which provides for the institution of proceedings; the explanation of the use of the expression “private prosecutor” in s. 175 appeared to be that it makes better sense in juxtaposition with “public prosecutor”, and the order for compensation was also invalid.

Appeal allowed. Magistrate’s order set aside.

Case referred to:

- (1) *R. v. Kassamali Jaffer and Others* (1930), 1 T.L.R. (R.) 176.

Judgment

Williams J: This appeal has already been allowed and reasons are now given.

The appellant was a witness on whose information the police brought a prosecution for arson against an accused. After his evidence only had been heard, they offered no further evidence and the accused was acquitted. The learned trial magistrate found that this complaint was frivolous and vexatious and ordered him to pay accused Shs. 500/- compensation and Shs. 500/- costs. These orders are not supported by the Crown.

Both orders were made under s. 175 Criminal Procedure Code which provides:

“If on the acquittal of an accused person any court shall be of the opinion that the charge was frivolous or vexatious such court may order the complainant to pay to the accused person a reasonable sum as compensation for the trouble and expense to which such person may have been put by reason of such charge

in addition to his costs.”

Section 173 provides for the making of orders as to costs and sub-s. (3) refers to s. 175 Criminal Procedure Code as follows:

“The costs awarded under this section may be awarded in addition to any compensation awarded under s. 175.”

In my view “in addition to his costs” in s. 175 Criminal Procedure Code means in addition to costs awarded under s. 173 Criminal Procedure Code. Section 173 Criminal Procedure Code provides for costs to be awarded against a private prosecutor but not an informant to the police. I therefore find that the order against appellant for the payment of costs was invalid.

With regard to the order for the payment of compensation, the appeal is on the grounds that “complainant” in s. 175 Criminal Procedure Code is synonymous with “private prosecutor” and so does not provide for orders against informants to the police any more than s. 173 Criminal Procedure Code. In *R. v. Kassamali Jaffer and Others* (1) (1930), 1 T.L.R. (R.) 176, a decision as to costs, it was held obiter on the same grounds by Sheridan, C.J., that an order such as the present one would be invalid (the sections were then numbered differently). I follow what was held there, particular reference being to the fact that the Crown is the true complainant in any public prosecution. I add the following observations. “Complainant” and “private prosecutor” are synonymous for the purposes of s. 88, Criminal Procedure Code, which provides for the institution of proceedings. The reason for using “private prosecutor” rather than “complainant” in s. 175, Criminal Procedure Code, would appear to be that it makes better sense in juxtaposition with “public prosecutor”. An accused as against an informant to the police is protected first of all by their skill in detecting false and vexatious complaints and, failing that, he has the right to bring against the informant a private prosecution for any relevant offence or a civil action for malicious prosecution. In these circumstances I find that the order for the payment of compensation was also invalid.

Appeal allowed. Magistrate’s order set aside.

For the appellant:

Augustine Saidi

For the respondent:

RA Caldwell (Crown Counsel, Tanganyika)

For the appellant:

Advocates: *Augustine Saidi*, Arusha

For the respondent:

The Attorney-General, Tanganyika

Sadrudin Shariff v Tarlochan Singh s/o Jwala Singh
[1961] 1 EA 72 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 3 January 1961

Case Number: 29/1960

Before: Sir Kenneth O'Connor P, Gould JA and Connell J
Appeal from: H.M. Supreme Court of Kenya–Sir Ronald Sinclair, C.J

[1] Contract – Legality – Claim for repairs by garage – Licence required for garage – Whether contract for repairs illegal – Non-compliance with provisions of Registration of Business Ordinance, 1951 – Whether court can grant relief – Traders' Ordinance, 1951, s. 2, s. 4, s. 6 (1), s. 22 and s. 26 (K.) – Township (Licence Fees) Rules, r. 2, r. 4 and r. 5 (K.) – Registration of Business Names Ordinance, 1951, s. 8, s. 11 and s. 33 (K.).

[2] Evidence – Appeal – Admission of additional evidence – Defence of illegality not pleaded – Whether evidence of legality can be admitted on appeal – Civil Procedure (Revised) Rules, 1948, O. XLI, r. 22 (K.).

Editor's Summary

The appellant had sued the respondent in the magistrate's court for Shs. 450/- due on a promissory note. The respondent counter-claimed Shs. 1,285/20 for repairs to the appellant's motor vehicle. At the hearing the respondent was asked whether he had a garage licence and although it had not been pleaded the appellant at the last minute raised the defence that, as the respondent had no township licence for a garage, the work had been done in pursuance of an illegal contract. The magistrate held that the contract was not illegal and gave judgment for the respondent. On appeal, the Supreme Court admitted further evidence from the respondent that he was at the material time in possession of a valid licence. It transpired, however, from that evidence that the contract was possibly unenforceable on the grounds that the respondent might have been a "defaulter" within s. 9 of the Registration of Business Names Ordinance, 1951. The Supreme Court dismissed the appeal holding that it had not been proved that the respondent was a "defaulter" and that even if he were one, it was just and equitable to grant relief. The appellant appealed again *inter alia* on the grounds that the Supreme Court was wrong in upholding the finding of the magistrate that the contract was not illegal, in allowing fresh evidence to be given during the appeal, and in not holding that the counterclaim was unenforceable under the Registration of Business Names Ordinance, 1951.

Held –

- (i) although under the Townships Ordinance the licensing authority has a limited power to refuse a licence, the rules themselves are not so worded as to indicate any intention of prohibiting contracts, but only of penalising those who carry on trades without a licence; therefore the submission that the contract, the subject matter of the counter-claim, was illegal, was rightly rejected.
- (ii) as the question of illegality arose *ex improviso* in the magistrate's court, it was completely within the discretion of the Supreme Court to admit fresh evidence on application and to have denied the application would have been to risk rank injustice to the respondent.
- (iii) the Supreme Court had a very wide discretion to grant relief against the disability imposed by s. 11 of the Registration of Business Names Ordinance; a mere procedural defect should not be permitted to affect the matter.

Appeal dismissed.

Cases referred to:

- (1) *Smith v. Mawhood*, 153 E.R. 552.
- (2) *Jiwan Singh v. Rugnath Jeram* (1945), 12 E.A.C.A. 21.
- (3) *Brown v. Rolls Royce Ltd.*, [1960] 1 All E.R. 577.
- (4) *Hawkins v. Duche*, [1921] 3 K.B. 226.
- (5) *Mason v. Mogridge* (1892), 8 T.L.R. 805.
- (6) *Sadler v. Whiteman*, [1910] 1 K.B. 868.

January 3. The following judgments were read:

Judgment

Gould JA: This is an appeal from a judgment of the learned Chief Justice sitting in appellate jurisdiction, in which he dismissed (except on a matter of costs) an appeal from a judgment of the resident magistrate at Kisii. The appellant (plaintiff) sued the respondent (defendant) for Shs. 450/- due on a promissory note and the respondent counter-claimed for Shs. 1,285/20 for services rendered and materials supplied in relation to repairs to the appellant's motor vehicle.

The respondent did not deny his liability on the promissory note but the appellant denied liability on the counter-claim, entirely in his defence to counter-claim, and partially in his evidence before the resident magistrate. He was not, however, believed, and judgment on the counter-claim was given in favour of the respondent. This appeal is concerned only with the counter-claim.

At the hearing before the resident magistrate the respondent was cross-examined on the question of the name under which he ran his garage business and as to whether he had a licence. There was no reference to illegality of contract anywhere in the pleadings. The evidence, as recorded, is not very clear but the resident magistrate, in his judgment, said:

"An eleventh hour defence to the counter-claim was raised that all this work was in furtherance of an illegal contract. It was not so pleaded as it arose ex improviso. Defendant was not in possession of a township licence for a garage, which Mr. Bharvada argued was a continuing offence. The fact is that defendant had applied in his own name but by the time it had been formally approved he had registered his business name. That licence was issued after proceedings had been instituted and in February, I think, of this year. The defendant had, it is clear, the tacit approval of the township advisory committee in the meantime and his operation of the garage could only be an offence of the most extreme technicality.

"Even if that were so, Mr. Bharvada misses the point. The courts only step in when the purpose of the contract is a declared illegal one (or is immoral). This is neither. There is not anything illegal in carrying out repairs on a car. The object of these three separate contracts was not intended to drive a coach and (sic) through the township rules. Two quite different things."

On appeal to the Supreme Court this finding of the resident magistrate was challenged. The learned Chief Justice, however, at the hearing of the appeal admitted further evidence from the respondent, who produced a licence to carry on the business of a garage under the Traders' Licensing Ordinance, 1951, and a licence for the premises under the Townships (Licence Fees) Rules (Vol. VI of the Laws of Kenya; p. 1538) both valid for the material period. There was therefore no question of the contract being illegal

upon the ground put forward before the resident magistrate. It transpired, however, from the evidence given before the learned Chief Justice, that there was a possibility

that the contract was unenforceable having regard to the provisions of s. 9 and s. 11 of the Registration of Business Names Ordinance, 1951. Section 11 provides that the rights of “a defaulter” under a contract entered into by him in relation to his business shall not be enforceable by action or other legal proceeding while such default continues. On this question the learned Chief Justice found:

“Under s. 9 of the Ordinance the defendant was required, within twenty-eight days after he took over Kisii Motor Works, to send by registered post or deliver to the Registrar of Business Names a notice in writing specifying the change in particulars. If the notice was not sent within twenty-eight days he was a defaulter. He was vague as to dates and it may be that the notice was sent within the required period. At least it was not proved that he was a defaulter. In my view, therefore, the plaintiff was not entitled to resist the counter-claim on the ground that it was unenforceable, under s. 11 of the Ordinance.

“Even if the notice was not sent within twenty-eight days and the defendant was a defaulter, I am satisfied that it is just and equitable in the circumstances to grant relief in respect of this contract under s. 11 of the Ordinance and I so do. In my view, therefore judgment was rightly entered for the defendant on the counter-claim for the amount claimed.”

Having regard to the grounds of appeal to this court I will set out also an earlier passage from the judgment of the learned Chief Justice, which was not essential to his judgment:

“In view of the confused state of the evidence I think that the magistrate would have been justified, at least so far as the licences were concerned, in refusing to declare the agreement illegal on the ground that the whole of the circumstances were not before him.”

The memorandum of appeal to this court is a lengthy document and, rather than set it out in full, I will be content with the summary given by counsel for the appellant in opening the appeal. He contended that the learned Chief Justice was wrong.

1. In holding (obiter) that the resident magistrate, Kisii, was justified in not holding that the contract was illegal.
2. In allowing fresh evidence to be given during the appeal.
3. In not holding that the counter-claim was unenforceable by reason of the “fresh” illegality shown at the hearing of the appeal. (The reference is to the Registration of Business Names Ordinance, 1951.)
4. In his order as to costs.

It will be convenient to deal with the second ground of appeal first. The relevant portion of O. XLI, r. 22 of the Civil Procedure (Revised) Rules, 1948, which deals with the admission of additional evidence on appeal to the Supreme Court, reads:

“22. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—

.....

(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause;

“the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.”

The complaint made by counsel for the appellant was that this evidence was admitted on an application made at a late stage of the hearing of the appeal and, when given, contradicted what the respondent had said in the court of the resident magistrate; the evidence, it was submitted, was not unobtainable when the action was tried. These arguments are based upon general practice, and, as such, have weight, but they are not of such weight in the circumstances of this case, as to indicate that the order of the learned Chief Justice was wrong. On the contrary, in my respectful opinion it was entirely correct. In the resident magistrate’s court, neither illegality as such, nor facts upon which a plea of illegality could be based, was pleaded. The question of the licences was raised during the cross-examination of the respondent, who could not be expected to have refreshed his memory on the subject, or to have brought the relevant documents to court. It is true that his advocate might have asked for an adjournment to investigate the matter, but he may have considered, as did the resident magistrate, that no case of illegality had been made out. In the event, he made no such application and the result was that the record contained meagre and confused evidence on the subject of the respondent’s licences. I do not propose to recapitulate the evidence, but the difficulty of the position is indicated by the fact that, an appeal based on the question of illegality having been lodged and counsel for the appellant having commenced his address to the Supreme Court, he was then constrained to ask for an adjournment, “to investigate the illegality further”. It was after the adjournment that counsel for the respondent produced the licences in question and asked leave to prove them; I do not think that counsel for the appellant can be heard to complain if opposing counsel also took advantage of the adjournment “to investigate the illegality further”. Having regard to the fact that the matter arose ex improviso in the court of the resident magistrate and to the resultant lack of full investigation of the question of illegality, and to the history of the appeal itself, it was in my opinion, completely within the discretion of the learned Chief Justice to admit the evidence in spite of the lateness and nature of the application. To have denied the application would have been to risk rank injustice to the respondent, had the appeal gone against him on a question of illegality based on his failure to take out these particular licences.

That being my opinion on ground 2 of the appeal, it follows that the appellant cannot succeed on ground 1. The question raised has, however, some relevance to the submission that the order for costs made by the learned Chief Justice was wrong, and it will be expedient to express briefly my view upon it. One of the two licences produced is expressed to be issued under the Traders’ Licensing Ordinance, 1951, s. 6 (1), and authorises the holder, “to carry on the business of garage”. Section 6 (1) merely lays down the form of a licence issued under s. 4 of the Ordinance, the first three sub-sections of which read:

- “4.(1) A licensing officer shall have power to issue licences under this Ordinance.
- “(2) No person shall trade, or carry on the business of a commercial traveller, or of a commission agent or indent agent, or of a manufacturer’s representative, or of a caterer unless he is the holder of a valid licence issued by a licensing officer under this Ordinance.
- “(3) If any person contravenes the provisions of this section, he shall be liable for a first offence to a fine not exceeding one thousand shillings or in default of payment to imprisonment for any term not exceeding two months, and for a second or subsequent offence to a fine not exceeding five thousand shillings or in default of payment to imprisonment for a term not exceeding six months.”

If the operating of a garage is to fall within the purview of sub-s. (2) it must clearly be because of the opening words “No person shall trade”. The word “trade”, however, is defined in s. 2 as follows:

“ ‘trade’ means the sale or exposure for sale in a shop of goods for the purpose of profit and ‘trading’ shall be construed accordingly.”

The normal operation of a garage business is not caught by this definition though possibly the sale of accessories might be; the court is not concerned with that in the present case. I therefore find nothing in the Ordinance, and have been referred to no other law, which renders it illegal to carry on a garage business without a licence under the Ordinance. This may be a defect in the Ordinance, as the exemptions provided for in s. 22 and s. 26 thereof appear to contemplate wider classes of trading than the definition imports. It was nevertheless for the appellant to show that the operation of the garage in question without such a licence would have been illegal; I am unable to see that he did so.

The second licence exhibited was issued under the Townships (Licence Fees) Rules (supra). Rule 2 provides:

“The following licence fees shall be payable by the persons concerned in the classes of townships specified in respect of the services, trades or occupations mentioned:

“9. Motor repairers and garages . . .”

Rule 4 and r. 5 read:

“4. Every licence fee imposed by these rules shall be a civil debt recoverable summarily.

“5. Any person failing or neglecting to pay any licence fee which he is liable to pay under these rules shall be liable to a fine not exceeding one thousand shillings, and, in the case of a continuing offence, to a fine not exceeding one hundred shillings in respect of each day during which the offence continues.”

The rule-making power is contained in s. 33 of the Townships Ordinance (Cap. 133 of the Laws of Kenya) which gives power to make rules regulating the licensing of innumerable trades and businesses (even including cycle repairers) but, strangely, appears to have overlooked motor repairers and garages. The reference in the rules to that trade may be *ultra vires* or might be considered to fall within the general words of s. 33. However that may be, I am satisfied that the rules themselves, properly construed, constitute merely a revenue measure, within the authority of such cases as *Smith v. Mawhood* (1), 153 E.R. 552, and do not render illegal, contractual relations entered into in the absence of a licence. Although, under the Ordinance, the licensing authority has a limited power to refuse a licence (s. 8 to s. 11) I do not consider that the rules themselves are so worded as to indicate any intention of prohibiting contracts, but only of penalising those who carry on the various trades, etc. without a licence. In *Jiwan Singh v. Rugnath Jeram* (2) (1945), 12 E.A.C.A. 21 at p. 30, Sir Norman Whitley, C.J., expressed a similar opinion with regard to the Traders’ Licensing Ordinance, 1936, the predecessor of the Traders’ Licensing Ordinance, 1951. For these reasons I am of opinion that, even on the basis of the evidence adduced before the learned resident magistrate, the submission that the contract, the subject matter of the counter-claim, was illegal, was rightly rejected.

Under the third ground of appeal counsel for the appellant contended that the finding of the learned Chief Justice (in the passage from his judgment quoted above) that it was not proved that the respondent was a defaulter,

ought not to be sustained. A default consists in not giving notice of a change of particulars under s. 9 of the Registration of Business Names Ordinance, 1951, and it was submitted that because the respondent admitted that he did not receive the certificate from the registrar until February, 1959, the onus shifted to the respondent to show that he had sent the required notice within the prescribed period of twenty-eight days. The respondent's evidence was that he took over the garage in August, 1958, and sent the notice in September or October. It must be remembered that this was not a case in which illegality had been put in issue by the pleadings, but the appellant sought to establish it by evidence elicited from his opponent. The burden of proof was definitely, and in the circumstances even heavily, in my opinion, upon the appellant; while I would not rule out the possibility that a provisional, or shifting, burden might be created by the state of the evidence in such a case, I very much doubt whether it was so created in the present case, where all requisite evidence would have been procured by the appellant from the registrar. I think the case was one in which the following words of Lord Denning, in *Brown v. Rolls Royce Ltd.* (3), [1960] 1 All E.R. 577 at 582, are applicable:

"At the end of the day, the court has to ask itself—not whether the provisional burden is discharged—but whether the legal burden has been discharged, that is to say: Has the pursuer proved that the defenders were negligent?"

I think that principle was applied by the learned Chief Justice and I see no reason to dissent from his finding. In any event the matter lacks consequence, since the learned Chief Justice, in case the respondent ought to have been regarded as a defaulter, granted relief against the disability imposed by s. 11 of the Ordinance. This grant was attacked by counsel on the ground that no separate application for it had been made. The learned Chief Justice had a very wide discretion to grant relief; he had jurisdiction in view of the oral application which had been made, and he had both parties before him in the suit. The case of *Hawkins v. Duche* (4), [1921] 3 K.B. 226, does not deal with the exact point, but shows that the power is a very wide one and may be exercised in the course of a trial. I would respectfully adopt the following passage from the judgment of McCardie, J., at p. 231 and p. 232:

"It would, I feel, be deplorable if at the very close of a long and costly litigation a defendant should manage to elicit a trivial and inadvertent breach by the plaintiffs of the Act and thereby defeat the whole action which was otherwise well founded. The defendant would, I suppose, in such case then claim his costs. A further result might be that the plaintiff would be barred by the Statute of Limitations from commencing new proceedings after he had gotten relief."

I do not consider that a mere procedural defect should be permitted to affect the matter and I find no merit in this submission.

Also under ground 3 of the appeal, counsel for the appellant put forward another procedural argument. The action was brought against the respondent in his personal name and the same heading was of course retained in the counter-claim. Counsel submitted that the evidence showed that the respondent was trading as Kisii Motor Works when the appellant's debt was contracted, and that the respondent so trading was not the same party as the respondent personally, who had been sued by the appellant; he could not therefore counter-claim. I would confess to considerable surprise if this proposition, for which no authority was quoted, were to be found valid in law. The procedure relating to

"Suits by or against firms and persons carrying on business in names other than their own"

is dealt with in O. XXIX of the Civil Procedure (Revised) Rules, 1948. Rule 9 of that Order provides:

“Any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this order shall apply.”

It is to be observed that, while r. 1 of the Order, which deals with partnerships, uses the words “may sue or be sued in the name of the firm”, r. 9 is confined to “may be sued in such name or style”. A person such as the respondent, therefore, the sole proprietor of a business but trading under a business name, must sue in his personal name; under corresponding provisions of the English practice it has been held that that is obligatory—*Mason v. Mogridge* (5) (1892), 8 T.L.R. 805. I have no doubt that he is entitled to add some such words as “trading as—” but those are words of description only. It is suggested in the Annual Practice (1960) p.1154 under a note headed “Moneylender”, that such a practice ought to be adopted in the case of licensed moneylenders, but that is not applicable in the present case. The respondent is the plaintiff on the counter-claim and he sued, quite properly, in his own name. The language of O. 29 is in any event permissive and the real party is the individual, irrespective of his business name. In *Sadler v. Whiteman* (6), [1910] 1 K.B. 868 at p. 889, Farwell, L.J., said:

“The fallacy is to say that a partner in a firm does not, but the firm does, carry on business. In English law a firm as such has no existence; partners carry on business both as principals and agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under O. XLVIII.A it may be used for the sake of suing and being sued.”

This applies a fortiori to the case of an individual trading under a business name. In my opinion this ground of appeal also fails.

The final complaint is as to the order for costs made by the learned Chief Justice. After hearing argument he allowed the respondent one-half of the costs of the appeal, disallowing the costs of calling the respondent in the Supreme Court. The only measure of success obtained by the appellant in the Supreme Court, was that the order made by the resident magistrate that the appellant pay the whole cost of the proceedings before him was altered to an order that the appellant have the costs of the claim and the respondent those of the counter-claim. This alteration could not have been of very great substance, for the appellant’s claim was never contested and all of the evidence and argument related to the counter-claim. Before this court counsel submitted that he ought to have had all of the costs in the resident magistrate’s court and of the appeal; the reason is stated in the prayer of the memorandum of appeal to be:

“which appeal was occasioned by his own misleading evidence in the court below and which appeal was perfectly justified by that evidence”.

I have endeavoured to show earlier in this judgment that the appeal in question could not have succeeded even on the basis of the evidence referred to, and this argument is accordingly without substance. I would not, therefore, interfere with the award made by the learned Chief Justice in his discretion. In my opinion, in view of the comparatively small amount involved, this litigation has been continued to undue lengths to support, not a matter of principle, but a defence technical rather than meritorious. It is illustrative of the danger of endeavouring to establish such a defence by what is often called a “fishing”

cross-examination, in place of due investigation, reflected in satisfactory pleadings, before the case comes on for hearing.

I would dismiss the appeal with costs.

Sir Kenneth O'Connor P: I agree. The appeal is dismissed with costs.

Connell J: I also agree.

Appeal dismissed.

For the appellant:

MJE Morgan

For the respondent:

MZA Malik

For the appellant:

Advocates: *Mervyn Morgan & Co*, Nairobi

For the respondent:

AH Malik & Co, Nairobi

CD Patel v R
[1961] 1 EA 79 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	31 January 1961
Case Number:	1213/1960
Before:	Sir Ronald Sinclair CJ and Rudd J

[1] By-law – Construction – Validity – Local authority – Power to require demolition of building – Power exercisable if unauthorised alteration to existing building – Whether by-law reasonable – Nairobi Municipality (Building) By-laws, 1948, By-laws 6, 352, 353 and 374 A.

Editor's Summary

The appellant, as owner of a building, was served with two notices issued by the City Council of Nairobi under By-laws 374A and 353 of the Nairobi Municipality (Building) By-laws, 1948. The first notice required the appellant to cease from allowing his building to be used for purposes other than those for which it was constructed in that eight rooms constructed as stores were used for living and two other rooms constructed as stores were used as kitchens. The second notice required the appellant to remove “a

building”, to wit, a door and frame which had been inserted in the wall between two ground floor rooms constructed as stores. The appellant did not comply with the requirements of either notice and was prosecuted and convicted on two counts for his failure to do so. On appeal it was argued for the appellant that having parted with possession of the stores to his tenants he could not be found guilty of allowing unauthorised user unless he was proved to have been privy thereto; that as regards the door and frame inserted to provide direct communication between the two ground floor stores, the notice was invalid since the council was not empowered by By-law 353 to issue a notice requiring their removal and that failure to comply with the notice was not an offence against By-law 376.

Held –

- (i) although under By-law 6 (c) the alteration of any part of an existing building is deemed to be the erection of a building, it is not right to apply that by-law to assist the construction of By-law 353.
- (ii) By-law 353 is complete in itself and is to be construed on its own terms as an independent provision.
- (iii) the construction which the city council had placed upon By-law 353 could lead in the case of a trivial unauthorised alteration to a requisition by the council for the demolition of the whole building which would be quite unreasonable.

- (iv) there was another possible construction of By-law 353 which was not unreasonable the effect of which would be to give the owner the option of removing or demolishing his building or of executing such works prescribed in a notice as might be necessary to make the building comply with the by-laws.
- (v) since the notice to remove the building in the instant case gave the owner no such option it was not a valid notice and failure to comply was not an offence.

Appeal dismissed on the first count. Appeal allowed on the second count.

No cases referred to in judgment

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant appeals from convictions on two counts of failing to comply with the requisitions contained in two notices served in pursuance of By-law 374A and By-law 353 respectively of the Nairobi Municipality (Building) By-laws, 1948.

The notice in respect of the first count called upon the appellant as owner of a building to cease from allowing his building to be used for purposes other than those for which it was constructed in that eight rooms constructed as stores were used for living purposes and two other rooms constructed as stores were used as kitchens.

The notice in respect of the second count required the appellant to remove “a building”, to wit, a door and frame, which had been inserted in the wall between two rooms on the ground floor of the building which were constructed as stores.

After hearing the arguments we thought that it might be necessary to give mature consideration to the proper construction which should be placed upon By-law 352 (*b*). When this by-law is read with the definitions contained in By-law 3, difficult questions of construction could arise in certain circumstances but, having considered this by-law in relation to the evidence in the case, we think that those difficulties do not arise in the present appeal and that it is not necessary for the purposes of this appeal for us to deal with them in the present judgment.

The main building, which was constructed by or for the appellant as owner, consists of a basement, a ground floor and an upper storey. The basement was constructed as stores, the ground floor was constructed as shops and stores and the upper storey was constructed as two flats or dwellings.

We think it is clear from the approved plan which was exhibited that the only dwellings which were constructed and authorised were the two flats on the upper storey and that none of the accommodation in the basement and ground floor was constructed as dwellings or parts of dwellings. The contrary was not argued either before us or in the lower court.

On the evidence, eight rooms in the basement which were constructed as stores and were not constructed as dwellings or parts of dwellings, were being used as living accommodation, two of them being used as kitchens. Similarly, two rooms on the ground floor which were constructed as stores were used for living purposes. In effect, these ten stores which were not constructed as dwellings or parts of dwellings were converted to dwellings or parts of dwellings without authority. Such converted use was

clearly in contravention of the by-laws and when the appellant was served with the notice in respect of the first count he failed to comply with its requirements.

It was suggested in argument on behalf of the appellant that inasmuch as he was the landlord and had parted with his right to possession of the stores in question to tenants he could not be found guilty of allowing the stores to be used for unauthorised purposes unless he was privy to such user and that he

was not proved to have been privy to such user. In our opinion there is no substance in this argument and the conviction on the first count must stand.

As regards the second count, the two stores on the ground floor as originally constructed were divided by a solid wall. Subsequently a door and door frame were inserted in this wall to provide direct communication between these two stores, which were used for living purposes instead of as stores. This constituted an alteration of the building which was not approved by the council. The appellant failed to comply with a notice requiring him to remove the door and frame.

The question is whether or not in the circumstances the notice requiring the appellant to remove the door and frame from the wall was a valid notice under By-law 353, which reads as follows:

“any owner, builder or other person who shall erect or begin to erect a building or make any alteration or addition to a building before he has lodged an application for the approval by the council of his proposals and the plans relative thereto, as required by these by-laws, or before the council shall have signified their approval of the plans, sections, elevations, descriptions and particulars relating to such building, or after the council have signified their disapproval of the plans, sections, elevations and particulars relating to such building, shall each severally be guilty of an offence against these by-laws. In any such case whether or not proceedings have been instituted against any of the persons offending, the council may serve upon the owner of such building a notice under the hand of the town clerk requiring such owner within a period of time specified in such notice to execute such work or make such alterations or additions to such building as may be prescribed in such notice, in order to render such building safe or sanitary or otherwise conform to the requirements of these by-laws, or to remove or demolish such building. Alternatively in any case where in the opinion of the council such action is necessary, the council after not less than fourteen days notice in writing served upon the occupiers of such building may enter the premises and execute such work or make such alterations or additions to such building or remove or demolish the building without liability for any loss or damage which may be occasioned thereby, and may recover the cost of such work from the owner as a civil debt.”

If the appellant had made the alteration he could have been charged and convicted of the offence created by the first sentence of this by-law, but he was not charged with the offence of making the unauthorised alterations. He was charged with failing to comply with a notice requiring the removal of the door and frame. It is therefore necessary to consider whether the city council was empowered under By-law 353 to issue a notice requiring the removal of the door and frame and whether failure to comply with such notice constitutes an offence against By-law 376, which makes it an offence to fail to comply with the requisitions of any notice served under the by-laws within the time specified by such notice.

Under By-law 6 (c) the re-erection or alteration of any part of an existing building is deemed to be the erection of a building. It was argued that this by-law should be applied to the construction of By-law 353 and that the words “such building” in By-law 353 would thus mean for the purposes of this case the door and frame which was installed in the wall.

But if By-law 6 (c) is to be applied then it can be argued that the building which is deemed to have been erected is not the door and frame alone. It would be the alteration of part of the existing building, that is the hole in the wall as well as the door and frame which were installed in it. The notice which was

served on the appellant, if complied with, would not result in the removal of the building in that sense.

However, we do not think that By-law 6 (c) should be applied in that sense to the construction of the By-law 353, which is complete in itself and does not require such an application of By-law 6 (c). Indeed the words “or make any alteration or addition to a building” indicate that the framer of the by-law intended to provide expressly in this particular by-law for the consequences which may follow when an alteration or addition is made to a building without prior approval and that he did not intend that By-law 6 (c) should be applied at any rate as regards alterations or additions to a building.

In the case of an addition by adding an upper storey it might be very necessary for safety to strengthen the original building but that could not be required under By-law 353 if “such building” meant only the addition. A similar condition could easily arise in the case of some alterations. It appears to us that at any rate, as regards alterations to a building, By-law 353 was intended to be an independent provision and to be construed on its own terms without reference to By-law 6 (c). If that be the case then we think “such building” in that by-law would mean (in the circumstances of this appeal) the original building as altered.

The by-law provides that the persons responsible for the unauthorised alteration are guilty of an offence and provides further that irrespective of whether proceedings for such an offence have been taken

“the council may serve upon the owner of such building a notice . . . requiring such owner within the period of time specified in such notice to execute such work or make such alterations or additions to such building as may be prescribed in such notice, in order to render such building safe or sanitary or otherwise conform to the requirements of the by-laws, or to remove or demolish such building.”

The city council has construed this part of the by-law as empowering it to elect whether it shall require the building to be removed or demolished or made safe, sanitary and to conform to the requirements of the by-laws. At first sight this appears to be a construction which is very possible on the terms of the by-law. However, when the matter is carefully considered it becomes apparent that such a construction could in certain circumstances be quite unreasonable.

It would mean that in the case of a trivial unauthorised alteration the council could arbitrarily require the whole building to be demolished without giving the owner any option to execute such work on it as may be necessary to make it safe, sanitary or otherwise conform to the by-laws. This would be quite unreasonable and might involve the quashing of this part of the by-law. It is obviously desirable to find another construction which is not unreasonable. We think that there is another possible construction which is not at all unreasonable.

The by-law consists of three sentences:

The first sentence of the by-law provides that persons guilty of erecting or altering or making an addition to a building before plans are approved shall be guilty of an offence.

The second sentence appears to be directed to ensuring that such buildings shall either be removed or demolished or made safe, sanitary and in conformity with the by-laws. This sentence is not intended to be punitive, its object is remedial where remedy is necessary.

The third sentence is also remedial and can only be invoked in cases in which the action taken under it is considered to be necessary.

When action under the second sentence is contemplated we think the by-law requires that the owner be given an option to remove or demolish the building or else to execute such works prescribed in the notice as are necessary to make

the building safe, sanitary or otherwise conform to the by-laws. This construction would be applicable irrespective of whether or not By-law 6 (c) should be applied to the interpretation of By-law 353. There may be some cases in which it would be clearly impossible to make the building safe, sanitary or otherwise conform to the by-laws and in such a case, if it were established, we are not to be taken as holding that a notice requiring demolition or removal would not be justified. But there is nothing to indicate that this is a case of that kind and the owner should have been given an option.

The notice in this case did not give such an option and accordingly it was not a valid notice. Failure to comply with it was not an offence.

The appeal against conviction on the second count therefore succeeds. We do not consider the sentence in respect of the conviction for the first count to be excessive in the circumstances. The appeal as regards conviction and sentence on the first count is dismissed.

The appeal as regards conviction and sentence on the second count is allowed. The conviction and sentence on the second count are set aside and the fine in respect of that count, if paid, must be refunded.

Appeal dismissed on the first count. Appeal allowed on the second count.

For the appellant:

J Gledhill

For the respondent:

PA Clarke (Town Clerk's Department, Nairobi)

For the appellant:

Advocates: *J Gledhill*, Nairobi

For the respondent:

The Attorney-General, Kenya

Ali Mahdi v Abdulla Mohamed
[1961] 1 EA 83 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	28 February 1961
Case Number:	14/1960
Before:	Law J

[1] *Workmen's compensation – Accident – Arising out of employment – Employee travelling in employer's lorry – Duty to accompany lorry – Sand thrown up by other vehicle – Employee's eye lost – Whether accident in course of employment – Workmen's Compensation Ordinance (Cap. 263), s. 5 (T).*

[2] Burden of proof – Civil action – Claim by alleged employee – Claim against former partner – No evidence called by alleged employer – Evidence that partnership dissolved – Whether employment proved.

[3] Workmen's Compensation – Jurisdiction – Proper court to determine claim – Accident occurring outside jurisdiction of court in which claim made – Whether court has jurisdiction – Workmen's Compensation Ordinance (Cap. 263), s. 16 (1), s. 19 (1) (T.) – Workmen's Compensation Rules, r. 30 (T.) – Indian Code of Civil Procedure, 1908, s. 20.

[4] Procedure – Appeal – Jurisdiction – Workman's claim for compensation – Accident occurring outside territorial jurisdiction of court where claim made – Jurisdiction to try claim – Issue of jurisdiction not raised at trial – Whether question of jurisdiction can be raised on appeal – Indian Code of Civil Procedure, 1908, s. 21.

Editor's Summary

The respondent claimed compensation in the Dar-es-Salaam District Court under the Workmen's Compensation Ordinance and alleged that the appellant was his employer. The respondent claimed that he lost his eye through sand thrown up by a passing vehicle which entered his eye when he was travelling on duty in a vehicle belonging to the appellant. It was admitted that the injury occurred between Lindi and Mtwara. The main issues at the trial were whether

the respondent was an employee or a partner of the appellant and whether the respondent lost his eye by an accident arising out of and in the course of his employment. The respondent gave evidence that a former partnership with the appellant had been dissolved and the appellant called no evidence at all. The trial magistrate found for the respondent on both issues. On appeal it was submitted that on the evidence the trial magistrate should have held that the respondent had failed to discharge the onus of proving that the relationship of master and servant existed at the material time, or that an accident had occurred, and if so, that it occurred in the course of employment, that the Dar-es-Salaam District Court had no jurisdiction to enforce the respondent's claim by virtue of s. 16 (1) of the Workmen's Compensation Ordinance as the alleged accident took place outside its territorial jurisdiction. Section 16 (1) *ibid*, provides, *inter alia*, that a workman may "make an application for enforcing his claim to compensation to the court having jurisdiction in the district in which the accident giving rise to the claim occurred".

Held –

- (i) on the evidence available to the trial magistrate it was open to him to find that the respondent was an employee and not a partner of the appellant.
- (ii) there was evidence to support the finding that the accident arose out of and in the course of the respondent's employment.
- (iii) the words "the workman may" in s. 16 (1) of the Workmen's Compensation Ordinance are clearly permissive and are not to be read in any compulsive or restrictive sense.
- (iv) it was open to the respondent at his discretion to sue either in the court having jurisdiction where the accident occurred under s. 16 (1) of the Ordinance or under s. 20 of the Code of Civil Procedure at the place where his employer resided and carried on business; accordingly the Dar-es-Salaam District Court had jurisdiction to determine the claim.
- (v) by s. 21 of the Code of Civil Procedure the appellant was precluded from objecting on appeal on the ground of jurisdiction.

Appeal dismissed with costs.

Cases referred to:

- (1) *Julius v. Bishop of Oxford* (1880), 5 App. Cas. 214.
- (2) *Re Baker* (1890), 44 Ch. D. 262.
- (3) *York and N. Midland Rly. v. R.* (1853), 22 L.J.Q.B. 225.

Judgment

Law J: This is an appeal by the employer from a decision of a resident magistrate, sitting in the Dar-es-Salaam District Court, in Workmen's Compensation Cause No. 1 of 1959. The applicant in that cause (the present respondent) claimed compensation for the loss of his left eye, allegedly injured by sand being thrown into it by a passing vehicle at a time when he was in another vehicle in the course of his employment by the appellant. The main issues before the learned magistrate were whether the respondent was an employee or a partner of the appellant, and whether the respondent lost his eye as the result of an accident arising out of and in the course of his employment. In a short judgment, the learned

magistrate answered these issues in a sense favourable to the respondent. He found that there was no partnership between the respondent and the appellant at the material time, and that the respondent was on duty in the course of his employment, and in the course of that employment suffered the injury to his eye. Grounds 2 to 7 inclusive of the memorandum of appeal are directed against these findings. Mr. Fraser Murray and Mr. Dastur, for the appellant employer, have submitted

that on the evidence the learned magistrate should have held that the respondent had failed to discharge the onus of proving that the relationship of master and servant existed at the material time, or that an accident had occurred, and if so, that it occurred in the course of employment. On the first point, the respondent testified that he and the appellant had been partners in a butchery until May, 1956, when the partnership was dissolved, and that thereafter he was retained by the appellant as a salaried employee, and that at the time of the accident he was employed by the appellant as a clerk, his duties including accompanying a lorry owned by the appellant for the purpose of supervising the collection and delivery of goods. In cross-examination the respondent denied that at the material time (October, 1956) he was a partner of the appellant's. Various cheques were shown to the respondent and admitted to have been received by him from the appellant in 1957 and 1958. The respondent explained that these cheques were partly in respect of salary and partly in settlement of his dues under the dissolved partnership. His explanation of one of these cheques, for a sum of Shs. 5,000/- received in March, 1957, is not clear, and the learned magistrate commented in his judgment that if it could have been shown that this money was paid "by way of partnership account" he would have rejected the respondent's claim, but as no evidence was called on behalf of the appellant, the magistrate found on the evidence available to him that no partnership existed at the material time. It is indeed surprising, if there was a partnership between the parties throughout 1956 and 1957, that the appellant did not testify to this effect and produce his books of account, which, if a partnership in fact existed, would surely have established the fact beyond doubt. On the evidence available to the learned magistrate it was open to him, in my opinion, to find that in October, 1956, the respondent was an employee and not a partner.

As regards the accident, there was evidence that the respondent received particles of sand in his left eye thrown up by another vehicle, and that these particles caused an injury to his eye resulting in its removal by surgical operation a few days later. Such a throwing-up of sand, causing injury to an eye, is in my opinion an accident within the meaning of s. 5 of the Workmen's Compensation Ordinance (Cap. 263), which I will hereinafter refer to as the Ordinance. The learned magistrate found that this accident arose out of and in the course of respondent's employment, and there was evidence to support this finding. This appeal accordingly fails, so far as it is based on grounds 2 to 7 of the memorandum of appeal.

There remains to be dealt with the first ground of appeal, which raises a point of considerable importance and legal complexity. It is worded as follows:

"The learned resident magistrate failed to direct himself on the fact that the Dar-es-Salaam District Court had no jurisdiction to enforce the respondent's claim by virtue of s. 16 (1) of the Workmen's Compensation Ordinance as the alleged accident for which the claim was raised in the application took place between Lindi and Mtwara."

It is a matter of geography, of which this court can take judicial notice, that Lindi and Mtwara are places in the Southern Province, more than two hundred miles from Dar-es-Salaam, and outside the territorial jurisdiction of the Dar-es-Salaam District Court.

Section 16 (1) of the Ordinance reads as follows:

"If an employer on whom notice of the accident has been served under the provisions of s. 13 does not within twenty-one days after the receipt of the notice agree in writing with the workman as to the amount of compensation to be paid, the workman may, in such form and manner as may be provided by Rules of Court under s. 44, make an application for

enforcing his claim to compensation to the court having jurisdiction in the district in which the accident giving rise to the claim occurred.”

By s. 3 of the Ordinance, “court” means a subordinate court of a first-class magistrate. Such courts exist both in the Lindi and Mtwara districts. No objection to the jurisdiction of the Dar-es-Salaam District Court was made at the hearing of the application, the subject of this appeal.

Mr. Murray submits:

- (1) that s. 16 (1) of the Ordinance is exclusive as to jurisdiction, and that the only court in which a claim under the Ordinance can be determined is the first-class subordinate court of the district in which the accident occurred;
- (2) that the Dar-es-Salaam District Court had no jurisdiction to determine the respondent’s claim, and that its decree is accordingly a nullity;
- (3) that the use of the permissive “may” in s. 16 (1) does not confer upon a workman a discretion to make his application in any other court which would have jurisdiction in the case of ordinary suits, for instance under s. 20 of the Code of Civil Procedure which requires suits to be instituted in the court within the local limits of whose jurisdiction the defendant resides or carries on business.

As regards s. 21 of the Code of Civil Procedure, which precludes an appellate court from allowing an objection as to the place of suing unless such objection was taken in the court of first instance, Mr. Murray submits that s. 21 relates only to suits filed under s. 15 to s. 20 inclusive of the Code of Civil Procedure, and that the respondent’s application could only validly be made under s. 16 (1) of the Ordinance, and that the appellant is accordingly not precluded from raising his objection at this appellate stage.

Mr. I. R. Vellani for the respondent submits:

- (1) that s. 19 (1) of the Ordinance and r. 30 of the Workmen’s Compensation Rules make it clear that the law, rules and practice relating to ordinary civil suits apply to proceedings under the Ordinance;
- (2) that s. 20 of the Code of Civil Procedure accordingly applies to claims for compensation, and that the respondent’s claim was therefore properly instituted in the Dar-es-Salaam District Court, being the first-class subordinate court within whose jurisdiction the appellant resides and ordinarily carries on business;
- (3) that s. 16 (1) of the Ordinance is designed purely for the convenience of the workman, who may live and be injured far from his employer’s residence or place of business, by conferring upon the workman a discretionary and additional right of instituting proceedings in a court other than that provided for by the ordinary rules of civil procedure.

If Mr. Murray’s submission as to the interpretation of s. 16 (1) of the Ordinance is correct, it would mean that if a workman is injured whilst on safari at, say, Sumbawanga, he is obliged to make his claim for compensation in the district court at Sumbawanga, although he, his employer, and their witnesses including doctors may all reside in Dar-es-Salaam, several hundred miles away, to the great inconvenience of all concerned. This cannot be what the legislature intended, but as Mr. Murray rightly said, the law must be applied as it is found, irrespective of hardship, and a right created by statute can only be exercised in accordance with the express provisions of the statute.

In my view, the words “the workman may” in s. 16 (1) of the Ordinance are clearly permissive and are not to be read in any compulsive or restrictive

sense. The test is as laid down in *Julius v. Bishop of Oxford* (1) (1880), 5 App. Cas. 214. When a power, permissive on the face of it, is coupled with a duty of the person to whom it is given to exercise it, then it is imperative (*Re Baker* (2) (1890), 44 Ch. D. 262). In the case now under consideration, however, the workman as donee of the power has only his own interests or inconvenience to consult. He is not under any duty to make an application to a court. In such a case, the word “may” is plainly permissive only, and the power conferred is one which he may exercise or not at pleasure. (*York and N. Midland Rly. v. R.* (3) (1853), 22 L.J.Q.B. 225.) In my opinion, s. 16 (1) of the Ordinance confers upon a workman a discretion to make his application in the court of the district where the accident occurred. There is nothing restrictive or exclusive about this discretionary power, which is designed solely for the workman’s convenience and to exempt him—if he so wishes—from the ordinary requirement of having to sue his employer in the place where the latter lives. The power to sue in the place where the accident occurred is a privilege additional to the ordinary rules as to place of suing. It was open to the workman to sue either at the place of the accident, under s. 16 (1) of the Ordinance, or under s. 20 of the Code of Civil Procedure at the place where his employer resides and carries on business, at his discretion. The Dar-es-Salaam District Court accordingly had jurisdiction to determine the claim, the subject of this appeal, under s. 19 of the Ordinance as read with s. 20 of the Code of Civil Procedure. The appellant is accordingly precluded, by s. 21 of the Code, from objecting to the jurisdiction of the Dar-es-Salaam District Court at this stage. In any event I am satisfied that the Dar-es-Salaam District Court had jurisdiction to determine the claim. The first ground of appeal accordingly also fails, and this appeal is dismissed, with costs to the respondent.

Appeal dismissed with costs.

For the appellant:

WD Fraser Murray and PR Dastur

For the respondent:

IR Vellani

For the appellant:

Advocates: *Fraser Murray, Thornton & Co*, Dar-es-Salaam

For the respondent:

Vellani & Company, Dar-es-Salaam

Re an Application by Hirji Transport Service **[1961] 1 EA 88 (HCT)**

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	16 February 1961
Case Number:	111/1960
Before:	Biron Ag J

[1] *Certiorari – Transport licensing – Licence granted – Appeal by objectors – Appeal dismissed summarily by appellate tribunal – Subsequent restoration of appeal – Whether appellate tribunal has jurisdiction to restore a dismissed appeal – Transport Licensing Ordinance (Cap. 373), s. 24 and s. 28 (T).*

Editor's Summary

The applicant firm applied for and obtained a transport licence from the Transport Licensing Authority. A company appeared at the hearing as an objector and then appealed to the Transport Licensing Appeal Tribunal against the decision of the authority granting the licence. The hearing of the appeal was set down for June 7, 1960. On that day counsel for the company requested an adjournment which was refused and the appeal was summarily dismissed. On August 2 the matter again came before the appeal tribunal when the appeal was restored and later heard and allowed. The applicant firm then sought leave to apply for a writ of certiorari to quash the order made by the appeal tribunal restoring the appeal on the ground that the appeal tribunal had no jurisdiction to restore an appeal which it had previously dismissed.

Held –the Transport Licensing Appeal Tribunal had no jurisdiction to restore the appeal which it had previously dismissed and a *prima facie* case for leave to apply for a writ of certiorari had been made out.

Application granted.

Case referred to:

(1) *Re an Application by Nagindas Himabhai Desai* (1954), 2 T.L.R. (R.) 192.

Judgment

Biron Ag J: The applicant firm applied for and were granted a transport licence by the Transport Licensing Authority. At the hearing of the application the appellant company appeared as objectors to the licence being granted. The appellant company then appealed from the decision of the licensing authority granting such licence to the Transport Licensing Appeal Tribunal, and the hearing of the appeal was set down for June 7, 1960. On that day counsel for the appellant company requested an adjournment. The request was rejected and the appeal was “summarily dismissed”. On August 2 the matter came on again before the appeal tribunal when the appeal was restored and a hearing date set down for September 6. The appeal was subsequently heard and allowed, apparently on September 19. This instant application has been brought by the applicant firm for leave to apply for the issue of a writ of certiorari to remove into this court and quash the order made by the appeal tribunal on August 2, or alternatively to remove into this court and quash the order made by the appeal tribunal on September 19.

Although by s. 28 (a) of the Transport Licensing Ordinance (Cap. 373 Sup. 56):

“Any decision of the tribunal under the provisions of this section shall be final and conclusive”,

it will not, I think, be disputed that certiorari will lie. In this respect it is pertinent to refer to the case of *Re an Application by Nagindas Himabhai Desai*

(1) (1954), 2 T.L.R. (R.) 192, wherein it was held that certiorari will lie from a decision of the then Milling Licensing Appeal Tribunal, although the provisions of the Ordinance relating to decisions of that tribunal, apparently ousting the jurisdiction of the courts to review decisions of the tribunal, were, I consider, couched in stronger language than the corresponding provisions in the Transport Licensing Ordinance above quoted. The relevant part of the headnote reads:

“The High Court may grant writs of certiorari despite the words of s. 24 of the Ordinance that the appeal tribunal’s decision ‘shall not be questioned in any court’ if the tribunal has acted without jurisdiction or in excess of jurisdiction.”

The ground on which the application in respect of the order of August 2 is based is that the appeal tribunal had no jurisdiction to restore the appeal which it had previously dismissed.

Although, as submitted by learned counsel for the applicant firm, the court could on this application order the issue of a writ of certiorari, I propose to confine myself to the application as brought, that is, for leave to apply for the issue of a writ. For the applicants to succeed on such application it is sufficient for them to establish a *prima facie* case for the issue of a writ.

The decision of the appeal tribunal dismissing the appeal is short and can be set out in full:

“The tribunal considers that no good reason for an adjournment has been shown. The appellant should have been prepared to go on. The Ordinance and Regulations require expeditious hearing of appeals and the personal convenience of an advocate is not a ground for an adjournment.

“Order appeal summarily dismissed.”

In the subsequent decision, that of August 2, restoring the appeal, it is stated *inter alia*:

“We are of the opinion that Mr. Roden has stated the position correctly.

“On June 7, 1960, Mr. Dave appeared to ask for an adjournment. We refused that adjournment.

“At that point in fact, although we did not record it, Mr. Dave withdrew—for he had no instructions to proceed on the hearing of the appeal. When we dismissed the appeal summarily we in fact did so on the basis that there was no appearance at the hearing of the appeal.

“We consider therefore that this application is one to restore an appeal which had been dismissed for default of appearance.”

It is submitted on behalf of the applicant firm that once the appeal tribunal had dismissed the appeal, it had no power to restore it, and that in fact there was an appearance by the appellant company. Mr. Kanji, who represented the applicant firm at the hearing on June 7, as well as at this present application, has stated in his affidavit that:

“The said appeal was set down for hearing on June 7, 1960, when I attended the hearing at 8.30 a.m. I was then informed by the chairman of the appeals tribunal that the advocate for the applicant had requested the tribunal by letter to adjourn the appeal as the hearing date was not convenient to him.

“My client’s representative was present at this meeting and I asked him whether he was agreeable for appeal to be adjourned. He informed me that he had specially undertaken a journey from Newala to Dar-es-Salaam for the purpose of appeal and he could see no reason why he should consent.

I therefore informed the tribunal that my instructions were to oppose the application for adjournment.

“At this stage of the proceedings, Mr. B. P. Dave, an advocate of Her Majesty’s High Court of Tanganyika practising at Dar-es-Salaam, came into the room and informed the tribunal that he was appearing on behalf of Mr. Roden for the appellant, Messrs. Tanganyika Transport Co. Ltd., and his instructions were to apply for an adjournment of the appeal.

“After hearing Mr. Dave the appeals tribunal retired to make a decision and dismissed the appeal. Mr. Dave was present when the decision was announced.”

On the face of the record, the appeal tribunal in restoring the appeal, appear to have acted without jurisdiction, as it will not, I think, be disputed that once the appeal tribunal has properly dismissed an appeal, it has no power to restore it, and on the face of the record there would appear to have been an appearance by the appellant company when the appeal was dismissed.

In the circumstances I consider that the applicant firm has made out a *prima facie* case for the issue of a writ of certiorari to remove into this court and quash the order of the appeal tribunal made on August 2, restoring the appeal it had dismissed.

As this application has been brought in the alternative, and as it was expressly stated by Mr. Kanji for the applicant firm, that if leave is granted on the first ground, that is, in respect of the order made on August 2, it will not be necessary to consider the other grounds, those in respect of the decision of the appeal tribunal allowing the appeal, I do not propose to consider such grounds, although—and this is really obiter—at first blush such grounds do not impress as being particularly persuasive.

Accordingly the application in respect of the decision of the appeal tribunal made on August 2 is granted, and leave to apply for the issue of a writ of certiorari is granted as prayed. The costs will be costs in the cause.

Application granted.

For the applicant:

SHM Kanji

For the applicant:

Advocates: *Messrs. Fraser Murray, Thornton & Company*, Dar-es-Salaam

AT Karia v Richard Wambura [1961] 1 EA 91 (HCT)

Division:	HM High Court of Tanganyika at Mwanza
Date of judgment:	4 January 1961
Case Number:	2/1960
Before:	Murphy J

[1] *Execution – Legislative Council – Order for attachment of member’s salary – Validity of order – Revisional jurisdiction – Indian Code of Civil Procedure, 1908, s. 60 (3) and s. 115 – Legislative Council (Power and Privileges) Ordinance (Cap. 354), s. 5 (T.).*

[2] *Privilege – Legislative Council – Issue of process addressed to clerk of council – Clerk required to attach member’s salary – Validity of court order – Legislative Council (Power and Privileges) Ordinance (Cap. 354), s. 5 (T.).*

Editor’s Summary

A magistrate made an order addressed to the clerk of the Legislative Council purporting to attach a member’s salary. As it appeared that this was not an order which could lawfully be made, the matter was set down for consideration by the High Court in revision.

Held –

- (i) the magistrate’s order was bad because the defendant was not an employee of the legislature and the provisions for attachment of salary contained in s. 60 (3) of the Indian Code of Civil Procedure did not apply.
- (ii) this was a case in which the High Court could properly exercise its power of revision under s. 115 of the Indian Code of Civil Procedure, since on the one hand the clerk of the council could not lawfully carry out the court’s order but on the other would disobey it at his peril, and the matter could not be put right in any other way.

Order accordingly.

Cases referred to:

- (1) *Muhinga Mukono v. Rushwa Native Farmers’ Co-operative Society Ltd.*, [1959] E.A. 595 (T.).
- (2) *Gurdevi v. Bakhsh* (1943), A.I.R. Lah. 65.

Judgment

Murphy J: On September 7, 1960, a first-class magistrate in the district court of Ukerewe made an order addressed to the clerk of the Legislative Council purporting to attach the salary which the judgment debtor in this case receives as a member of the council. As it appeared that this was not an order which could lawfully be made, the matter was set down for consideration by the High Court in revision. Notice of the hearing was served on the decree holder and on the judgment debtor but they did not appear. Mr. Taylor, Crown Counsel, appeared at my request as *amicus curiae*.

The order is clearly bad for two reasons. First, the judgment debtor is not an employee and the provisions for attachment of salary which are contained in s. 60 (3) of the Indian Code of Civil Procedure, 1908 (as amended) do not apply. Secondly, s. 5 of the Legislative Council (Power and Privileges) Ordinance (Cap. 354) provides, *inter alia*, that no process issued by any court in exercise of its civil jurisdiction shall be served or executed through an officer of the council. It follows that even if the salary were liable to attachment, there is no machinery available for attaching it.

The only point which has caused me some concern is whether this is a matter in which the High Court can properly exercise its power of revision under s. 115 of the Indian Code of Civil Procedure. The

conditions of the section are fulfilled to the extent that no appeal lies from the order and that the district

court acted with material irregularity. In *Muhinga Mukono v. Rushwa Native Farmers' Co-operative Society Ltd.* (1), [1959] E.A. 595 (T.), it was held by Davies, C.J., that the section could be applied to an interlocutory order. After considering the authorities, including the case of *Gurdevi v. Bakhsh* (2) (1943), A.I.R. Lah. 65 the learned Chief Justice said, at p. 597:

“It follows that I have come to the conclusion that the High Court has the right to revise an interlocutory order of a subordinate court. The right, however, is a discretionary one and I have to consider whether it would be proper to interfere with the decision of the resident magistrate to give leave to the defendants to appear and defend the suit.

“In the exercise of its discretion it is well established that the High Court will not necessarily interfere in every case where the subordinate court has made an irregular order unless its failure to do so would result in substantial injustice.”

I respectfully agree, but the question is whether the order now under consideration has caused a substantial injustice. Mr. Taylor argued that this was the case, since the decree holder has gone to the trouble of obtaining an order, only to find that by reason of s. 5 of the Legislative Council (Power and Privileges) Ordinance it is illusory. In my view this argument is well founded. But even if it were not, I am of the opinion that this is essentially a case for the exercise of the court's power under s. 115, since the matter cannot be put right in any other way: and it is obviously undesirable that the position should be left as it is, the Clerk of the Legislative Council being faced with a court order which he cannot lawfully carry out, yet disobeys at his peril.

The magistrate's order of September 7, 1960, is accordingly set aside. It is reasonable that any court fees paid by the decree holder in respect of the order should be refunded to him and I so order. The decree holder is, of course, at liberty to levy execution by any other means which may be open to him.

Order accordingly.

ZK Shah v the United Africa Press Ltd [1961] EA 93 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 3 March 1961
Case Number: 14/1960
Before: Sir Alastair Forbes V-P, Crawshaw JA and Sir Owen Corrie Ag JA
Appeal from: H.M. Supreme Court of Kenya–Pelly Murphy, J

[1] Pleading – Libel – Particulars – Newspaper report – Plaintiff not mentioned by full name – Descriptive details capable of leading to identification – Defence filed – No plea of no reasonable cause of action – Motion to strike out plaint – Whether filing of defence precludes motion to strike out plaint – Civil Procedure (Revised) Rules, 1948, O. 6, r. 1, r. 3, r. 9, r. 29 (K.) – Rules of the Supreme Court, O.

XIX, r. 4, r. 6 (2), r. 7; O. XXV, r. 4.

Editor's Summary

The appellant claimed damages for libel contained in an article in the respondent's weekly paper which referred to a "Shah landlord in the vicinity of Parklands" who had proceedings pending against a tenant before the Rent Control Board. The respondent filed a defence denying liability and a few weeks later applied by motion for the plaint to be struck out as disclosing no reasonable cause of action and, alternatively, for further and better particulars of the facts and matters from which it was to be inferred that the article referred to the plaintiff. The judge made an order that the plaint be struck out on the ground that the plaintiff had not in his pleading shown how the article identified him. On appeal it was submitted *inter alia* that the filing of the motion after the pleadings were closed was fatal to the application.

Held –

- (i) that the pleadings have closed is not necessarily fatal to an application under O. 6, r. 9.
- (ii) the question whether persons who lived near and knew the plaintiff could reasonably have been led to recognise the plaintiff as the landlord referred to in the article was a matter for the trial court to decide, after hearing the evidence; the facts identifying the plaintiff were substantial and it could not be said that the plaint did not disclose a cause of action.

Appeal allowed. Order of the Supreme Court set aside. Motion referred to the Supreme Court for consideration of what, if any, further particulars should be delivered.

Cases referred to:

- (1) *Attorney-General of Duchy of Lancaster v. L. & N.W. Railway*, [1892] 3 Ch. 274.
- (2) *Tucker v. Collinson* (1886), 34 W.R. 354; (1886), 2 T.L.R. (R.) 313.
- (3) *Cross v. Earl Howe* (1892), 62 L.J. Ch. 342.
- (4) *Fletcher v. Bethom* (1893), 68 L.T. 438.
- (5) *Bruce v. Odhams Press Ltd.*, [1936] 1 All E.R. 287.
- (6) *Republic of Peru v. Peruvian Guano Co.*, [1887] 36 Ch. 489.
- (7) *Hubbock & Sons Ltd. v. Wilkinson, Heywood and Clerk Ltd.*, [1899] 1 Q.B. 86.

March 3. The following judgments were read:

Judgment

Crawshaw JA: The appellant filed a suit against the respondent company in the Supreme Court at Nairobi claiming damages for libel. By his

defence dated November 7, 1959, the respondent denied liability. By notice of motion dated December 14, 1959, the respondent applied for the plaint to be struck out under O. VI, r. 29, on the ground that it disclosed no reasonable cause of action; in the alternative he asked for further and better particulars under O. VI, r. 3. The court made an order that the plaint be struck out and that the suit be dismissed with costs. It is against this order that the appellant has appealed.

The words complained of appeared in the respondent's weekly newspaper, "Africa Samachar", and the respondent's translation reads as follows:

"Beating of tenant's wife by landlord.

trouble created on account of frustration caused by Rent Control restriction Laws.

(Samachar pen writer)

Nairobi. It is understood that a Shah Landlord, in the vicinity of Parklands, has started troubling another Shah, a tenant, to vacate the rooms which the tenant and his family have occupied for the last eleven years, and it is said that the tenant has been paying his monthly rent regularly. It is alleged that last Tuesday night at 9 o'clock a landlord attacked a Shah tenant's wife. It is likely that the whole matter will be in the hands of the Rent Control."

Mr. Morgan, who represents the appellant, says he accepts this translation, which varied in some respects from that in the plaint, except that the words "a Shah tenant's wife" should read "the Shah tenant's wife".

Paragraphs 5 and 6 of the written statement of defence read:

- "5. In so far as the said words consist of statements of fact they are true in substance and in fact and in so far as the said words consist of expression of opinion they are fair and bona fide comment made without malice upon the said facts which are a matter of public interest.
- "6. The said publication was further on a matter of public interest, and constituted a fair and accurate report of the proceedings, and complaints and allegations of the parties therein, then pending before the Rent Control Board."

On November 25, 1959, the respondent's advocates had written to the appellant's advocates in the following terms:

"Further to our letter of the 25th instant we shall be glad if you will let us have the following further and better particulars—

"Under para. 4 of the plaint:

"Of the allegations contained in the above paragraph that the alleged words were published of the plaintiff please give particulars of the facts and matters from which it is to be inferred that the words were published of the plaintiff.

"Unless we receive the above particulars within the next ten days we regret we will have no alternative but to make an application to the court that the plaint be struck out as showing no cause of action."

To this they received the following reply of November 27, 1959:

"We regret that we cannot give you the particulars of our plaint which you now at this late hour ask for:

- (a) because what you are seeking to know is a matter of evidence;

- (b) you were able to plead to our plaint without the particulars now asked for;
- (c) your pleadings were closed when you delivered your defence; and all pleadings were closed when the unextended time for reply viz. seven days from defence expired.”

In his affidavit in reply to the motion Mr. Morgan said:

- “7 That the pleadings being closed the defendants were not entitled to ask for further and better particulars when they did nor are they now entitled to do this.
- “8. That the defendant in his defence did not plead that the plaint disclosed no cause of action and it is therefore not open to the defendants to argue this at this stage: in fact the defence by its phraseology conveys the very contrary and the defendants should not now be allowed to plead afresh by a notice of motion such as the present one.
- “9 . . . that the particulars asked for are matters of evidence and must therefore be rejected and the plaintiff should not be asked to reply to the same.”

The relevant part of O. VI, r. 29, provides that,

“The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case . . . may order the suit to be . . . dismissed.”

This rule is similar to O. 25, r. 4, of the English Rules of the Supreme Court. In the 1961 edition of the Annual Practice at p. 575 it is said the application:

“should be made promptly; it may be made before any defence is delivered (*A.-G. of Duchy of Lancaster v. L. & N. W. Railway* (1), [1892] 3 Ch. 274) . . . It may be made even after the pleadings are closed (per Brett, M.R., in *Tucker v. Collinson* (2) (1886), 34 W.R. 354), but was refused after the action had been set down for trial, and was only forty out of the list (*Cross v. Earl Howe* (3) (1892), 62 L.J. Ch. 342; *Fletcher v. Bethom* (4) (1893), 68 L.T. 438).”

The learned judge did not in his judgment consider the motion from the point of view argued by Mr. Morgan that the application to strike out the plaint should be disallowed on the ground that the pleadings had been closed. He allowed the application on the authority of *Bruce v. Odhams Press Ltd.* (5), [1936] 1 All E.R. 287. That case was also a libel action in which the court expressed the opinion that the statement of claim failed to disclose material facts. Greer, L.J., at p. 289 said:

“The material facts on which the plaintiff must rely for her claim in the present case seem to me necessarily to include the facts and matters from which it is to be inferred that the words were published of the plaintiff.”

And later he said they were facts:

“which the plaintiff had to allege to show that she had a cause of action against the defendants”.

These are of course the facts which the respondent in the instant case alleges have been omitted from the plaint. The appeal in the *Bruce* case (5), was based, however, on an application only for further particulars as to these facts and not for dismissal of the suit, although Scott, L.J., observed at p. 295 that the defendants might in the circumstances have applied under O. 25, r. 4, to strike out the statement of claim. It is to be observed that the application there was made prior to the filing of the defence.

It seems necessary to consider in the first place whether the fact that the motion in the instant case was not filed until after the pleadings were closed is fatal to the application for the striking out of the plaint; it is understood that the case had not been set down for hearing. Of the cases cited in the Annual Practice I do not think that the *Duchy of Lancaster* case (1), helps us. In *Tucker v. Collinson* (2), there has been available to me only the report in (1886) 2 T.L.R. 313. In that case the defendant filed a defence and the plaintiff a reply and, in the words of the headnote,

“upon this the Master had made an order to set aside the statement of claim on the ground that it disclosed no reasonable cause of action . . .”.

On appeal Lord Esher said:

“The rule of court provided that in case the action was shown by the pleadings to be frivolous the court may dismiss the action. Here there was a statement of claim, and of defence and of reply, and looking at all the pleadings the court had to say whether the action was frivolous. And looking at the pleadings, the reply admitting the defence, it appeared that the action should be dismissed; and the order being that it be stayed the appeal must be dismissed.”

Lindley, L.J., said:

“no doubt it was a strong thing summarily to stop an action; but in some cases it was necessary to do so, and in this case there was no ground whatever for the claim, and it was clear that the action was frivolous”.

It seems that there were special features in this case, in that the reply admitted the defence.

In *Cross v. Earl Howe* (3), application to strike out was made after the pleadings had been closed and the action set down for trial. North, J., said,

“My only difficulty is the lateness of the application. I do not think I can stop the action at this stage”.

In *Fletcher v. Bethom* (4), there were a number of defendants some of whom filed a defence and the others did not. After the former had filed their defence, all the defendants applied by motion to have the action dismissed on the ground that the statement of claim did not disclose a reasonable cause of action and that certain allegations were made without any reasonable grounds. Kekewich, J., said at p. 439:

“It was admitted on behalf of the plaintiff that, but for the allegation in para. 7, the statement of claim would be demurrable; that is, would not on a fair construction disclose a right of action, and an objection by way of demurrer to such a statement of claim, one I mean omitting para. 7, would not be of a technical character but would go to the root of the plaintiff’s case.”

He then held, for the reasons he gave, that the seventh paragraph must be treated as good by way of allegation. He made it clear that if he had had distinct evidence before him contradicting para. 7 he would have been prepared to admit it and, if he thought it sufficient, to have granted the relief asked for in the motion. Certain of the defendants had filed affidavits in support of the motion but others had not. The learned judge went on to say at p. 440:

“Having regard to the rule of caution in quashing an action in its inception which has always been adopted by the court, and which is concisely stated by Lord Herschell, L.C., in *Lawrence v. Norreys* (62 L.T. Rep. N.S. 706: 15 App. Cas. 219), I do not think it could be convenient

or right to decide against the plaintiff on such evidence as this. The other defendants represented by Mr. Gatey have filed no evidence at all, but they have taken another step which I think is fatal to their motion. They have delivered a statement of defence, and in that (para. 8) have traversed para. 7 of the statement of claim. Having put the point in issue by pleading, they cannot now be allowed to say that it is one which ought not to be in issue at all.”

It is to be observed that in the instant case the defence did not allege that the plaint disclosed no cause of action, and that by para. 4 it put in issue the question of identification. In *Fletcher v. Bethom* (4) the statement of claim contained an allegation in para. 7 which on the face of it disclosed a cause of action, whereas in the instant case it is asserted by the respondent and was so held by the learned judge that the plaint disclosed no cause of action. Kekewich, J., must not, I think, be read as saying that the filing of a defence is necessarily fatal to a motion to strike out. The circumstances were that there was an allegation in para. 7 which required to be answered and, by their defence, certain of the defendants had traversed it and put it in issue. Had it not been for para. 7 the learned judge may well, I think, have allowed the application even at that stage on the basis that:

“an objection by way of demurrer to such a statement of claim . . . would go to the root of the plaintiff’s case”.

We have been referred to the *Republic of Peru v. Peruvian Guano Company* (6), [1887] 36 Ch. 489 in which Chitty, J., at p. 496 said:

“Under the new rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleadings, which would have been fatal on a demurrer, the court sees that a substantial case is presented the court, should, I think, decline to strike out that pleading; but when the pleading discloses a case which the court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation.”

The claim in that case was struck out and the action dismissed with costs on the ground that there was no reasonable prospect that the case raised by the pleading would succeed, though “the pleader has made the best of his case”. The instant case is different in that if it is held that the plaint discloses no cause of action, the appellant asks leave to amend by the addition of facts which he says would show a cause of action.

From the authorities, and they are few, I do not think it can be said that merely because the pleadings have been closed no application will lie under O. VI, r. 9. The rule itself does not prescribe any such limitation, and appears to leave the matter to the discretion of the judge. Let us therefore consider whether the learned judge was right in holding that the plaint disclosed no cause of action and if so whether his order should be upheld.

In the *Bruce* case (5), Scott, L.J., at p. 294 differentiated between the necessity under O. 19, r. 4 (which is similar in substance to our O. VI, r. 1) of including in the pleadings the “material facts”, and of giving “particulars” under O. 19, r. 6 (2) which reads:

“In an action for libel or slander if the plaintiff alleges that the words or matter complained of were used in a defamatory sense other than their ordinary meaning he shall give particulars of the facts and matters on which he relies in support of such sense.”

We do not appear to have a rule similar to the latter, but O. VI, r. 3 (similar to the English O. 19, r. 7), enables:

“a further and better statement of the nature of the claim or defence, or further and better particulars . . .”

to be ordered. Scott, L.J., observed that particulars were in the discretion of the court, and said at p. 295:

“ . . . if it be assumed that the words contained in para. 3 of the statement of claim ‘published of the plaintiff’ are an insufficient statement of material facts within r. 4, the defendants might have applied under R.S.C.O. XXV, r. 4, to strike out the statement of claim as disclosing no cause of action, to take a middle course by applying under R.S.C. O. XIX, r. 7, for ‘a further and better statement of the nature of the claim’, and in either case would have been entitled as of right to the order as asked.”

The facts identifying the defamatory matter with the plaintiff as pleaded in the *Bruce* case (5), appear to have been extremely sketchy, the headnote reading:

“The plaintiff complained that she was libelled by a newspaper article concerning certain aeroplane smuggling exploits of ‘an English woman’. The plaintiff was not referred to by name or description, but alleged that the words ‘an English woman’ referred to her. The defendants applied for particulars of the facts from which it was to be inferred that the plaintiff was the person referred to.”

Scott, L.J., said at p. 295:

“ . . . I think it clear that a declaration not identifying the plaintiff in terms would have been held bad; and that the mere insertion of the words ‘published of the plaintiff’ would not have been regarded as sufficient averment: an averment of facts from which the general public or at least some particular persons or class of persons to whom the libel was published would have understood the plaintiff to be intended, with an appropriate innuendo applying the libel to the plaintiff, in the light of those facts would have been requisite.”

He then went on to say:

“but if this statement of claim would have been bad in the old days it is equally so now”.

The facts identifying the plaintiff in the instant plaint are, however, much more substantial. The plaintiff gives his name as “Shah”, and although Mr. Khanna for the respondent says that this is a community name such as “Patel”, one can take judicial notice of the fact that many Asians describe themselves as and are known as Mr. Shah or Mr. Patel, although such names may be common. The learned judge says,

“even if it is assumed that the name ‘Shah’ in the words complained of is a surname I do not think that the words sufficiently identify the plaintiff without further explanation”,

and he compares the name with that of Smith in London. Gatley on Libel And Slander, (4th Edn.) at p. 562 says: “where the plaintiff is actually named in the libel no difficulty can arise.” I would say that this was too definite an assertion in all circumstances. The learned judge goes on to say,

“it must be pleaded why certain persons identified the plaintiff. No such reasons are pleaded”.

With respect, however, other grounds for identification are pleaded in addition to the name. It is averred that the plaintiff lives in Parklands, which is an

area of Nairobi, is a landlord, that he had a tenant who he was trying to evict, and that the matter was then pending before the Rent Control Board; it is alleged that the words complained of:

“were understood by many readers as referring to the plaintiff and were in fact intended to refer to the plaintiff”.

What was not alleged was that the defendant’s name was also Shah, that the defendant had been in occupation for a long time and that he had a wife. In *Hubbock & Sons Limited v. Wilkinson, Heywood and Clerk, Limited* (7), [1899] 1 Q.B. 86, Lindley, M.R., at p. 91 said the procedure under O. 25, r. 4:

“ . . . is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression ‘reasonable cause of action’ in r. 4 shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases.”

And at p. 575 of the Annual Practice, 1961, it is said:

“But the practice is clear. So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out . . .”

Gatley at p. 113 seq says:

“To succeed in an action of defamation the plaintiff must not only prove that the defendant published the words and that they are defamatory: he must also identify himself as the person defamed.”

Then, quoting from a number of cases, he goes on to say:

“The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognised;” . . .

“ . . . if in the circumstances the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him.” . . .

“ . . . The question is whether the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant.” . . .

“ . . . If upon the evidence the jury are of opinion that ordinary sensible readers, knowing the plaintiff, would be of opinion that the article referred to him, the plaintiff’s case is made out.”

The question is whether persons, perhaps those who live near to and knew the plaintiff, could reasonably have been led to recognise the plaintiff as the landlord referred to in the article. This is a matter which should be left to the jury, or the judge as the case may be, provided that the plaint contains material facts on which a jury which is not perverse could find sufficient identification. As I have said, the plaintiff has sought in his plaint to identify himself with the person in the article by giving his name and, as description, by stating that he lives at Parklands, is a landlord having a tenant who he was trying to evict,

and that the matter was pending before the Rent Control Board. These facts go very much further than those in the *Bruce* case (5), and I do not think it can be said that the plaint does not disclose a cause of action. It is for the trial court to decide, after hearing the evidence, whether identity has been sufficiently established. In the circumstances it is not necessary to consider whether, had no cause of action been shown, the order of the learned judge was a proper one.

I would therefore reverse the order of the learned judge and refer the motion back to the Supreme Court for hearing the parties on what, if any, further particulars should be delivered. I would order that the respondent pays the costs of this appeal and of and incidental to the hearing of the motion so far as it has related to paras. 1 and 2 of the notice of motion.

Sir Alastair Forbes V-P: I agree. There will be an order in the terms proposed by the learned Justice of Appeal.

Sir Owen Corrie Ag JA: I agree.

Appeal allowed. Order of the Supreme Court set aside. Motion referred to the Supreme Court for consideration of what, if any, further particulars should be delivered.

For the appellant:

Mervyn JE Morgan

For the respondent:

DN Khanna

For the appellant:

Advocates: *Mervyn Morgan & Co*, Nairobi

For the respondent:

DN & RN Khanna, Nairobi

Livio Carli v Geom R Zompicchiati [1961] 1 EA 101 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	20 January 1961
Case Number:	25/1960
Before:	Sir Kenneth O'Connor P, Gould and Crawshaw JJA
Appeal from:	H.M. Supreme Court of Aden—Campbell, C.J

[1] Sale of Goods – Failure of consideration – Recovery of part of price – Portion of goods damaged – Rejection – Subsequent sale to purchaser at reduced price of rejected goods – Claim for refund of price

for damaged goods – Amount of refund to which purchaser entitled.

Editor's Summary

The respondent had ordered from the appellant a quantity of tiles for the purposes of a building contract at Aden. He had paid the full price of the tiles ordered, but on delivery a proportion of the tiles were found to be broken. The respondent rejected the broken tiles but subsequently bought them for a sum of Shs. 2,308/- and used them, and then sued for a refund of a proportionate part of the price. He was awarded Shs. 15,002/- as the proportion of the price attributable to the broken tiles. On appeal it was submitted for the appellant that the damages should have been limited to the Shs. 2,308/- paid for the broken tiles and that, by buying the broken tiles, the respondent had put himself in the position of having taken upon himself the performance of the appellant's contract. On appeal.

Held – the contract was for the sale of unascertained goods and as the place of delivery was to be Aden, the property in the goods did not pass until delivery; it followed that the property in the rejected tiles never passed under the contract; there was therefore a clear liability upon the appellant to refund a proportionate part of the price.

Appeal dismissed.

Cases referred to:

- (1) *Devaux v. Connolly* (1849), 8 C.B. 640.
- (2) *British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London, Ltd.*, [1912] A.C. 673.
- (3) *Erie County Natural Gas and Fuel Co., Ltd. v. Carroll*, [1911] A.C. 105.
- (4) *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301.

January 20. The following judgments were read:

Judgement

Gould JA: This is an appeal from a judgment and decree of the Supreme Court of Aden whereby the respondent (plaintiff) was awarded a sum of Shs. 18,129/- and costs against the appellant (the first defendant). The action was dismissed as against a second defendant, a limited company which is not a party to the appeal. The claim was concerned with two contracts, of which the more important was a contract under which the respondent agreed to purchase tiles from the appellant; a proportion of the tiles were found upon delivery to be broken and not in accordance with the contract. The price had been paid and the learned Chief Justice calculated that the proportion thereof attributable to the broken tiles was Shs. 15,002/- out of a total price of Shs. 33,340/-. He found also that the respondent was entitled to a refund of Shs. 1,607/- landing charges which he had been called upon by the appellant

to pay. The second contract was for the purchase of a number of mirrors by the respondent from the appellant; the mirrors were not delivered and the respondent sued successfully for a refund of the price, viz. Shs. 1,320/-. The judgment for Shs. 18,129/-, therefore, purports to be the total of the abovementioned amounts of Shs. 15,002/-, Shs. 1,607/- and Shs. 1,320/-; the attention of the court was not called to the fact that some error appears to have crept in, for the actual total of the three sums mentioned is Shs. 17,929/-.

As to the first contract, the decision of the learned Chief Justice in favour of the respondent stemmed from his finding that the contract for the purchase of the tiles was one for local purchase and not a c.i.f. contract as the appellant alleged. As counsel for the appellant fairly conceded, that finding was entirely one of fact, and, though he made a number of submissions against it, counsel for the respondent was not called upon by the court to argue, and I am content to say no more than that there was cogent evidence to support the learned Chief Justice's conclusion and that accordingly it is not for this court to interfere with it. With regard to the contract relating to the mirrors, it was common ground that these had not been delivered. Counsel for the appellant argued that the judgment should have been one for the delivery of the mirrors, instead of for a refund of the price paid, because there had been an unequivocal offer to deliver the mirrors before the action was commenced. It was common ground that delivery had been refused by the appellant, except upon conditions extraneous to the contract. Although counsel could point to a letter from himself dated September 10, 1957, indicating that the respondent could take delivery of the mirrors, subsequent correspondence showed that the delivery was nevertheless refused by the appellant. Counsel for the respondent was not called upon to argue this aspect of the case and I am satisfied that judgment for a refund of the price was rightly given.

The only aspect of the case which requires further discussion is the amount awarded by the learned Chief Justice in relation to the contract for the tiles. These had been ordered by the respondent for the purposes of a contract which he held for the erection of a bank building. Some time after the tiles arrived in Aden, a delivery order was given to the respondent, who had by then paid the whole price. The respondent's manager, Luigi Scotti, gave evidence that he then inspected the tiles which were in semi-open crates and found that a lot were broken—the tiles were nevertheless removed from the wharf to the site of the new building. There they were examined some days later, and a Mr. Gullino, representative of a salvage association of Genoa, surveyed them on the instructions of the appellant. Later, also on the instructions of the appellant, he sold the damaged tiles to the respondent for Shs. 2,308/-; by agreement with the architects concerned with the new bank building, the respondent was able to use these damaged tiles to complete part of the work for which they were intended. For this reason counsel for the appellant contended that the damages payable by his client should be limited to the sum of Shs. 2,308/- paid for the broken tiles. He argued that by this action the respondent put himself in the position of having taken upon himself the performance of the appellant's contract. I would observe in passing, that even if counsel's submission were correct in principle, there was a finding by the learned Chief Justice that only about thirty per cent. of the damaged tiles were used in the building, which indicates that the damages could not conceivably be limited to the amount paid for them. The learned Chief Justice dealt with the matter in his judgment as follows:

"I now come to the matter of damages. I accept, in fact it is not disputed, that 1,120 large and 40 small tiles were chipped or broken. The plaintiff took possession of all the tiles under protest and, at the request of the defendant, Mr. Gullino took possession of the broken ones on behalf

of a salvage association in Italy whose agent he appears to be. It is not in dispute that subsequently Mr. Gullino, with the express authority of the defendant, sold these broken and damaged tiles back to the plaintiff. There is evidence, and I accept it, that about thirty per cent. of these damaged tiles were used by the plaintiff in the construction of the same building for which the whole consignment had been purchased and that he had obtained the permission of his client to do so. It is claimed that the damages must therefore be diminished. I do not think so. In my view the subsequent purchase must be regarded as an entirely novel and separate matter. There is no evidence whatever that it was ever intended by either party to have any effect upon the legal rights of the parties if disputes should arise. It is unnecessary to enter into any inquiry as to how much or how little worse off the plaintiff was by using these broken tiles. The fact that they were in fact used does not mean that either the plaintiff or his client were in as good a position as they would have been if sound tiles had been used. Damages must be assessed upon the basis that save in special circumstances if unmerchantable articles are bought the buyer can get back the price for them which he may have paid.”

In my view, in respect of the tiles, there was no claim in this action for damages in the ordinary sense at all, and the word has been loosely used in the framing of issues and in the judgment. The broken tiles were in fact rejected and the relevant paragraph in the plaint shows that that is the basis of the claim. Paragraph 18 reads (in part):

“The broken tiles were unsuited for the purpose for which they were ordered and unacceptable to the plaintiff who had right to reject them and he informed defendant 1 accordingly. The insurance agent and surveyor took charge of the broken tiles which were then at his instance purchased by the plaintiff who paid him for same.”

The prayer claims merely a sum of money and does not mention damages. The same attitude appears in the correspondence. In a letter of August 16, 1957, from the advocate for the respondent to the appellant is the following passage:

“You have already been informed by my client that his estimate has been that about fifty per cent. of the tiles are broken and you are called upon to attend to the above site and give delivery to my client of the good tiles. You should do it within forty-eight hours as my client cannot afford any slightest delay in the matter.

“On such delivery of good ones, my client will claim the refund from you of the value of the rejected tiles.”

Another passage in a letter of August 26, 1957, from the same advocate to the appellant, reads:

“My client is surprised that your letter makes no mention about the crates of tiles which have been removed to the site of the British Bank of the Middle East and about which my client already informed you that there would be about fifty per cent of same broken and unuseable and you were asked to attend to the above site and give delivery to my client of the good tiles. You have not replied to this and it appears that you are delaying intentionally to put my client into loss. My client also repeatedly informed you orally, but to no effect.

“My client hereby informs you that in the presence of two witnesses he will open the said crates on Wednesday, August 28, at 9 a.m., at the site

of the above bank on your account and risk and will hold you responsible for the lot found to be damaged and unserviceable and will claim refund of the same in due course, as also for the other sums mentioned in my previous letter and for any loss or damage suffered by my client by delay and default on your part.”

The references to rejection and refund of the value are clear indications of the attitude of the respondent and the fact that the appellant accepted the rejection appears clearly from the appellant’s actions in instructing Mr. Gullino to take possession and to resell the broken tiles to the respondent, and in making a claim upon the insurance company for the loss. The contract being for the sale of unascertained goods and the place of delivery having been held to be Aden, the property in the goods would not pass until delivery, and it follows that the property in the rejected tiles never did pass under the contract. The actions of the parties show acceptance of this position. In respect of the rejected tiles, therefore, the appellant was in the same position as if he had never delivered them at all. See *Benjamin on Sale* (8th Edn.), p. 977.

The price of the tiles was fixed by the contract on an area basis, i.e. Shs. 80/- per square metre, and the contract was, therefore, in my opinion, severable as in the case of *Devaux v. Connolly* (1) (1849), 8 C.B. 640; 79 Revised Reports 159. In that case the sale was by weight and it was held that there was a partial failure of consideration in respect of the short delivery. In *Benjamin on Sale* (8th Edn.) at p. 419, it is put:

“Thus, if the buyer has paid for a certain quantity of goods sold at a certain rate of payment and the seller has delivered only part, and makes default in delivering the remainder, the buyer may repudiate the contract for the deficiency, and recover the price paid for the quantity deficient.”

That in my mind was the nature of the present action and it was inaccurate to describe it, as the learned Chief Justice did, as “a claim for damages for breach of an implied warranty”. That could only have been brought if the respondent, treating the breach of condition as a breach of warranty, had accepted the broken tiles and the property therein had passed to him. As it was, he could sue for the return of the proportion of the price (which he did) joining a claim for damages for non-delivery if he considered he had suffered any (which he did not do).

There was, therefore, a clear liability on the appellant to refund the proportionate part of the price. Is that liability to be reduced by reason of the action of the respondent in buying some of the broken tiles to assist in completing his building contract? I cannot think so for a moment. The fact that the broken tiles were from the same consignment is merely co-incidence. The respondent might well have purchased tiles from any source to complete his contract, and might possibly have got them at a lower price than the contract price, but that would not entitle the appellant to say:

“I have failed to deliver tiles for which you have paid me but you have made a lucky purchase and therefore I am not liable to repay all your money”.

I could not find it in conformity with logic to hold that the advantage which accrued from a purchase, at a lower price, of tiles to take the place of those undelivered, should go to the party who, by breaking his contract caused the shortage, rather than to the party aggrieved.

Counsel for the appellant relied upon such cases as *British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London, Ltd.* (2), [1912] A.C. 673; *Erie County Natural Gas and Fuel Co., Ltd. v. Carroll* (3), [1911] A.C. 105, and *Wertheim v. Chicoutimi Pulp Co.* (4), [1911]

A.C. 301. The last-mentioned case was one of late delivery, not non-delivery, and is mentioned in Benjamin on Sale in the following passage at p. 964:

“Although this case was distinguished in *Williams v. Agius* (u) and *Slater v. Hoyle* (x) from cases of non-delivery, yet it is difficult to reconcile it with the principle of *Rodocanachi v. Milburn* (y), according to which the resale price should have been regarded as an immaterial factor; and the Court of Appeal in *Slater v. Hoyle* was evidently of opinion obiter that the decision was a wrong one.”

Erie County Natural Gas and Fuel Co., Ltd. v. Carroll (3) was a case in which the plaintiffs had, upon a sale of certain rights, reserved to themselves a supply of natural gas; the purchasers later cut off the supply and the plaintiffs remedied the deficiency by developing or acquiring other gas wells. They sued the successors of the purchasers for the market value of the gas with which they should have been supplied, but it was shown that the plaintiffs had resold their new wells at a profit, so that the gas they had obtained to replace the gas which had been cut off, cost them nothing. In fact they profited. Their lordships said at pp. 116–7:

“The only question for decision is what, in the circumstances of the case, is the true measure of those damages. It would have been competent for the plaintiffs to have abstained from procuring gas in substitution for that which the defendants should have supplied to them, and to have sued the defendants for damages for breach of their contract. They did not take that course. They chose to perform on behalf of the defendants, in a reasonable way, that contract for them and to obtain from an independent source a sufficient quantity of gas, similar as near as might be in character and quality to that which they were entitled to receive. In such cases it is well established that the measure of damages is the cost of procuring the substituted article, not at all the price at which the substituted article when procured could have been sold by the person who has procured it.”

The rule with relation to the sale of goods was stated, at pp. 117–8, thus:

“Where the contract is one for the sale of goods one of the modes in which a party to it may, on the default of the party bound to perform it, perform it for him is by going into the market and buying goods of a description and quality similar to those contracted for; but if he purchases at a sum equal to or less than the contract price, he can only recover nominal damages, because, the cost of procuring the substituted article not being greater than the contract price, he has got goods equal to those contracted for and at the same or a less cost, and has therefore suffered no loss:”

This passage is of course of undoubted authority, but is concerned with damages pure and simple, and not with the refund of money paid for goods not delivered. Where there is a failure to deliver goods, the intending purchaser who has not paid the price, has his money intact (unlike the purchaser who has paid in advance) and can go into the market and buy other goods. If he is compelled to pay more than the contract price he can claim the excess as damages but if he buys at a lower price he can claim only nominal damages: but in that event he does not have to send a cheque for the difference between what he actually paid and the contract price, to his defaulting supplier. That exact position would be created if, when the price of goods had been paid in advance and default in delivery was made, the defaulting vendor could keep part of what he had been paid, merely because the purchaser had managed to buy the goods more cheaply elsewhere. In the *Erie County* case (3) no one had the temerity to suggest that because the plaintiffs had resold their new gas

mines at a profit the parties whose default was responsible for the acquisition of the new mines were entitled to that profit or part of it. Such a proposition has only to be stated for its absurdity to be manifest. The case of *British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London, Ltd.* (2) illustrates the same principle as the *Erie County* case (3) and I am of opinion that none of the authorities relied upon is applicable to the present circumstances, in which the respondent sought to recover money paid on a consideration which had failed. The position would have been different if the broken tiles had been accepted and the claim been for damages for breach of warranty; in that case the property in all the tiles would have passed, the respondent would not have been at expense to re-buy them, and the value of the useable tiles would have had to be taken into account. That did not happen, and it is idle to speculate whether such an eventuality would have been to the benefit or detriment of the appellant.

In my opinion the amount awarded by the learned Chief Justice in respect of the tiles was the correct one. I would therefore dismiss the appeal with costs.

The error in the total amount awarded by the judgment and decree, to which I referred earlier in this judgment, appears to be one of addition only, and if so could no doubt be rectified upon application to the Supreme Court.

Sir Kenneth O'Connor P: I agree and have nothing to add. The appeal will be dismissed with costs.

Crawshaw JA: I also agree.

Appeal dismissed.

For the appellant:

PK Sanghani

For the respondent:

E Westby Nunn

For the appellant:

Advocates: *PK Sanghani*, Aden

For the respondent:

Westby, Nunn & Kazi, Aden

**The Official Receiver and Liquidator of Sejpai Ltd v Narandas Nanji
Chandrani**

[1961] 1 EA 107 (CAK)

Division: Court of Appeal at Kampala

Date of judgment: 14 January 1961

Case Number: 10/1960

Before: Sir Alastair Forbes V-P, Crawshaw JA and Sir Owen Corrie Ag JA

Appeal from: H.M. High Court of Uganda–Keatinge, J

[1] Costs – Security for costs – Application for further security – Costs of appeal and past costs – Security for appeal lodged – Whether further security will be ordered – Eastern Africa Court of Appeal Rules, 1954, r. 19 (b), r. 58 and r. 60.

Editor’s Summary

The respondent applied under r. 60 of the Eastern Africa Court of Appeal Rules, 1954, for an order that the appellant should provide further security for the costs of an appeal and for past costs, on the ground that the appellant had no property or assets in Uganda. A judge of the High Court sitting as a judge of the appellate court, dismissed the application on the ground that the appellant had already deposited Shs. 1,500/- as security for costs of the appeal as required by r. 58 *ibid*. The respondent thereupon referred the application for decision by the full court under r. 19 (b) *ibid*. It was argued for the appellant that as the past costs had not been taxed, an order for security for such costs could not be made.

Held –

- (i) the application was for security for the costs of the appeal and for past costs; the security of Shs. 1,500/- already given related to the costs of the appeal alone whilst any application for security for past costs under r. 60 must necessarily be an application for further security.
- (ii) it is not essential to the making of an order for security for past costs that a bill of such costs should have been drawn up.

Order that the appellant do give further security in the sum of Shs. 1,500/- for the costs of the appeal and for the payment of past costs within twenty-one days.

Cases referred to:

- (1) *Hall v. Snowdon Hubbard & Co.*, [1899] 1 Q.B. 593.
- (2) *Abdi Nuri v. B.E.A. Corporation* (1909), 3 E.A.C.A. 12.

January 14. The following judgments were read by direction of the court:

Judgment

Sir Owen Corrie Ag JA: The respondent, Narandas Nanji Chandrani, is the defendant in a suit brought by the Official Receiver and Liquidator of the Estate of Sejpai Ltd. who claimed in the High Court of Uganda against the respondent for the sum of Shs. 35,009/34 with interest and costs.

The respondent, having filed a defence, the High Court, by an order of Mr. Justice Keatinge dated July 15, 1960, ordered that the third paragraph of the respondent’s defence be struck out.

The respondent appealed against this order; and there is a cross-appeal by the applicant claiming that the whole written statement of defence ought to have been struck out and judgment entered for the

applicant.

Two preliminary points arose for consideration. The first was an objection by Mr. Bhatt for the present applicant that the appeal was out of time. We overruled this objection for reasons stated in writing at the time, but made a special order as to costs.

The second preliminary matter for consideration was the instant application for an order that the respondent do give further security for costs. The application was heard in the first instance by Sheridan, J., sitting as a judge of this court, and was refused. Mr. Bhatt, for the applicant, referred the application for decision by the full court under r. 19 (b) of the Rules of this court. After hearing argument we reserved our decision upon it and stood over the hearing of the appeal and cross-appeal to the next sessions of the court in Kampala, subject to any order we might make on the application. I now deal with this application.

Under r. 58 of the Rules of this court, an appellant is required within sixty days after filing notice of appeal (*inter alia*) to lodge in court the sum of fifteen hundred shillings as security for the costs of the appeal. The application is made under r. 60, which provides that:

“The court or a judge or registrar may at any time, in any case where it or he thinks fit, order further security for costs to be given, and may order security to be given for the payment of past costs relating to the matters in question in the appeal.”

The ground upon which the application is made is stated in para. 11 of Mr. Bhatt’s affidavit annexed to the notice of motion, that he believes

“that the appellant since about September, 1957, has no trading or any business of his own and that he has no property or assets of his own in Uganda”.

In support of his application Mr. Bhatt has cited, among other authorities, the judgment of Smith, L.J., in *Hall v. Snowdon Hubbard & Co.* (1), [1899] 1 Q.B. 593 at p. 594, in which the learned judge said:

“The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made.”

In reply to this application, an affidavit by Mr. C. C. Patel, advocate, has been filed. In para. 5 (a) of this affidavit, the deponent states:

“That I verily believe that the plaintiff/respondent’s costs in this appeal and past costs would not in any event amount to Shs. 1,500/-.”

In para. 8 of the affidavit the deponent says:

“That the plaintiff/respondent elected to sue the defendant/appellant in his own person knowing full well that he had no business of his own in 1959 or at any time thereafter.”

To this, the applicant makes the obvious reply that when he sued the respondent, he was unaware that the latter was a man of straw. In refusing the application Sheridan, J., said:

“If the English authorities applied to this application and there was material before me to indicate that the probable costs, past and future, will exceed the prescribed Shs. 1,500/-, I might be inclined to grant it as the defendant appears to be a man of straw, but Mr. Bhatt’s argument overlooks the fact that those cases were decided on applications to furnish security whereas here, the defendant has already furnished security as

provided for by r. 58 of the Rules and this is an application to furnish further security. Neither counsel was able to cite to me any decision by a court in East Africa where such an application has been successfully made. In these circumstances, I must assume that when the president and other judges of the East African Court of Appeal made these Rules, they must have considered that only in exceptional cases should the sum of Shs. 1,500/- be increased.

“On the face of it, this is an appeal in a procedural matter which could be swiftly disposed of; in *Baird v. Hecquard* (1889), 5 T.L.R. 576 the Court of Appeal stated that it would be disinclined to order security for costs in such a matter.

“For these reasons, I dismiss the application with costs.”

In arriving at this decision the learned judge appears to have overlooked the fact that the application is for security for the costs of the appeal and for past costs; while the sum of Shs. 1,500/- to be secured under r. 58 relates to the costs of the appeal alone. Any application for security for past costs under r. 60 must necessarily be an application for further security, and it is thus clear that the framers of the Rules did contemplate that applications of this nature would be made and orders made thereon.

Mr. Bhatt has not suggested any reason why the sum of Shs. 1,500/- secured under r. 58 should be insufficient for the costs of the appeal. As regards past costs, however, the position is very different. Mr. Bhatt has informed the court that he has sent to the respondent's advocates for approval two bills of costs: and that one of these, relating to the application to strike out para. 3 of the defence, amounts to Shs. 1,661/50; while the other, opposing the application for leave to appeal, in which, although leave was granted, it was ordered that the applicant should have his costs, amounting to Shs. 2,981/-. Thus it is clear that however drastically these bills may be reduced upon taxation, there is a considerable sum due from the respondent to the applicant for past costs.

For the respondent, Mr. Suchak has put forward the argument that an order for security for past costs cannot be made until such costs have been taxed: and that in accordance with the judgment of Hamilton, J., in *Abdi Nuri v. B.E.A. Corporation* (2) (1909), 3 E.A.C.A. 12 at p. 15, the applicant cannot have his costs in this interlocutory matter taxed except as “costs which will form part of the decree in the suit”.

I see no substance in this argument.

In my view it is not essential to the making of an order for security for past costs that a bill of such costs should even have been drawn up.

In my opinion this is a proper case for an order under r. 60: and I should order that the appellant do give further security in the sum of Shs. 1,500/- for costs of the appeal and for the payment of past costs within twenty-one days of the delivery of this judgment; in default the appeal to stand dismissed with costs: and that the applicant should have the costs of this application.

Sir Alastair Forbes V-P: I agree and have nothing to add. There will be an order in the terms proposed by the learned Acting Justice of Appeal.

Crawshaw JA: I also agree.

Order that the appellant do give further security in the sum of Shs. 1,500/- for the costs of the appeal and for the payment of past costs within twenty-one days.

For the appellant:

YV Phadke and A Suchak

For the respondent:

JH Bhatt

For the appellant:

Advocates: *CC Patel & Suchak*, Jinja

For the respondent:

JH Bhatt, Jinja

The Attorney-General v Govindji HN Shah
[1961] 1 EA 110 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 March 1961
Case Number:	13/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Sir Owen Corrie Ag JA
Appeal from:	H.M. Supreme Court of Kenya–Rudd, J

[1] Immigration – Prohibited immigrant – Immigrant claiming adoption by resident – No contemporary documentary proof – Entry permit sought by resident for “my son” – Adoption not disclosed – Immigrant admitted – Removal order made – Burden of proof that presence in territory lawful – Whether entry through misrepresentation is lawful entry – Immigration Ordinance, 1956, s. 4 (5), s. 8, s. 11, s. 18 (2) (K.) – Defence (Admission of Women and Children) Regulations, 1940, Regs. 3, 5, 8 and Sch. (c) (K.) – Interpretation and General Provisions Ordinance, 1956, s. 3 (1) (K.).

Editor’s Summary

According to a statement made by the respondent to the immigration officer, he was adopted in 1933 in India whilst still a child. Other evidence established that his adoptive father did not visit India for the adoption but was at all material times living in Kenya. There were no contemporary documents proving the adoption and the respondent did not leave his own family and join his adoptive father until 1947 when he came to Kenya. Then his adoptive father applied to the Immigration Department for an entry permit for “my son”. It was conceded that when the respondent arrived and entered Kenya his entry had been authorised. After two years’ residence with his adoptive father he left and later became a shopkeeper in Nairobi. In 1958 the respondent was served with a removal order under s. 11 of the Immigration Ordinance which directed that he be removed from and remain out of Kenya. The order was made on the ground that the respondent was a prohibited immigrant. The respondent then filed an action in the Supreme Court claiming a declaration that his presence in Kenya was lawful and that he was entitled to a resident’s certificate. The appellant in his defence counterclaimed a declaration that the respondent’s presence was unlawful. The respondent at the trial elected not to give evidence but the trial

judge granted a declaration that the removal order was void and that the respondent's presence in Kenya was lawful. On appeal

Held –

- (i) almost all the signs of a genuine Hindu adoption were absent in the present case.
- (ii) the respondent's entry into Kenya, being based on a permit obtained by a material misrepresentation, was unlawful; an adopted son is not a "child" of the adopting father within category (c) of the Defence (Admission of Women and Children) Regulations, 1940. *Hirji Devchand Ramji v. The Attorney-General* (1956), 23 E.A.C.A. 20, adopted.
- (iii) the legal burden of proving that an immigrant is not a prohibited immigrant at the time of first entry rests under s. 18 (2) of Immigration Ordinance upon the immigrant and does not shift.
- (iv) the respondent had not discharged that burden of proof.

Appeal allowed. Declaration claimed by the appellant granted.

Cases referred to:

- (1) *Ghose v. Dasi* (1880), 6 Cal. 381.
- (2) *Sree Narain Mitter v. Dassee* (1873), 1 I.A. 149.

- (3) *Hirji Devchand Ramji v. Attorney-General for Kenya* (1956), 23 E.A.C.A. 20.
- (4) *Ex parte Bhagubhai Bhanabhai* (1954), 27 K.L.R. 134.
- (5) *Keshavlal Punja Parbat Shah v. The Superintendent of H.M. Prison, Nairobi, and Another* (1955), 22 E.A.C.A. 218.
- (6) *Chimanlal Motibhai Hira Patel v. The Attorney-General*, [1960] E.A. 388 (C.A.).
- (7) *Huyton-with-Roby U.D.C. v. Hunter*, [1955] 2 All E.R. 398.
- (8) *Dunn v. Dunn*, [1948] 2 All E.R. 822.

March 3. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: The respondent resides at Nairobi in Kenya. On April 17, 1958, the Chief Secretary made a removal order against him under s. 11 of the Immigration Ordinance, 1956, directing that he be removed from and remain out of the Colony. This was made on the ground that he was a prohibited immigrant.

On August 6, 1958, the respondent filed a suit in the Supreme Court claiming a declaration that the removal order was void, a declaration that his presence in the Colony was lawful, a declaration that he was entitled to be granted a resident's certificate, costs and other relief.

The appellant in his defence did not content himself with resisting the respondent's claim; but (in a document which does not mention the word "counterclaim") took the unusual course of counterclaiming a declaration that the removal order served on the respondent had been lawfully made, a declaration that the respondent's presence in the Colony was unlawful, and costs. By a decree dated February 1, 1961, the learned judge granted declarations that the removal order was void and of no effect and that the respondent's presence in the Colony was lawful and gave the respondent the costs of the suit. He did not deal, except by implication, with the appellant's claims. Against this decision the appellant appeals to this court.

The relevant facts appear partly from admissions in the pleadings, partly from signed statements by the respondent and the respondent's adoptive father, Hirji Nathoo Verji, when under interrogation by an immigration officer (admissible in evidence under s. 4 (5) of the Immigration Ordinance, 1956) and partly from the evidence of an immigration officer. They may be summarised as follows:

The respondent, Govindji Hirji, is the son of Narshi Nathoo and alleges that he is the adopted son of Narshi Nathoo's younger brother, Hirji Nathoo. The father, Narshi Nathoo, at all material times resided in India. The alleged adoptive father, Hirji Nathoo, at all material times resided in Kenya. The respondent is alleged to have been adopted by Hirji Nathoo in 1933 while his real father (who died in 1940 or 1942) was still alive. In 1933 when the adoption of the respondent is alleged to have taken place the alleged adoptive father was twenty-four years old. He stated that he thought then that there was no chance of his getting married; in fact, he married in the following year and is the father of four children of whom two are sons. He was in East Africa at the date of the alleged adoption and he did not go to India for it; he told the immigration officer that he wrote to India to relatives who performed the ceremony for him, but he obtained no documents till 1953 (twenty years later) when, the respondent and his alleged adoptive

father being both in Kenya, “we regularised the position”. Documents are not strictly necessary to Hindu adoption; but a giving of the child by the father (generally to the adoptive mother) and acceptance of the child are essential: *Ghose v. Dasi* (1) (1880),

6 Cal. 381; *Sree Narain Mitter v. Dassee* (2) (1873), 1 I.A. 149; *Hirji Devchand Ramji v. Attorney-General for Kenya* (3) (1956), 23 E.A.C.A. 20. After his alleged adoption in 1933 the respondent did not leave his own family and join his adoptive family until he came to Kenya in 1947.

The way in which the respondent gained admission to Kenya was as follows: On January 24, 1947, Hirji Nathoo wrote to the immigration officer, Nairobi, a letter as under:

“Re: Entry Permit For My Son, Govindji Hirji,

Aged fifteen Years.

“I shall be glad if you will kindly issue me a permit for my son, Govindji Hirji, aged fifteen years, to enter in this Colony from India for further studies here.

“I am resident of this Colony since 1926, and at first travelled from India on passport No. w k 1173, issued to me at Rajkot, India, on 10/5/26. My present passport No. 9228, issued to me at Kampala on 6/6/1940. Moreover I am regular taxpayer and I am working with the firm of Kathiawar Service Stores, River Road, Nairobi.

“Thanking you and awaiting necessary permit.

Yours faithfully,

Shah Hirji Nathoo.”

It will be observed that Hirji Nathoo described the appellant as “my son” and not as “my adopted son”.

This letter was given reference No. 42/A/26009 in the Immigration Office, which number appears in red pencil on it. The same number in red pencil in the same handwriting together with a date apparently “26.5.46” appears on the form of immigration particulars which was filled up and submitted by the respondent when he arrived as an immigrant at Mombasa on August 20, 1947. These two documents have both been produced by an immigration officer from official custody. The permit asked for in Hirji Nathoo’s letter was not produced. Evidence on this point was given by Mohammed Chaudri, an immigration officer, as follows:

“When a person’s entry was authorised a letter was sent to the person who applied for the permit and very often that letter was surrendered when the immigrant entered the Colony. We call it the authority letter. This letter would bear reference number which is allocated to each applicant.

“Reference No. 42A/26009 appears on exhibit A.

“Same number appears on immigration particulars form now produced, exhibit B. It is in relation to same application. Plaintiff identified this as the document which he signed when he entered the Colony. The reference number on the top shows that permission to enter was given under Defence (Admission of Children) Regulations, 1940.”

It is to be observed that this witness stated definitely that when a person’s entry was authorised a letter was sent to the person who applied for the permit. A written permit is not an essential in law; but it is hardly to be supposed that Hirji Nathoo or anyone else would have arranged the respondent’s passage from India to Kenya if he had not previously ascertained that the boy would not be turned back at Mombasa. It is, at the least, highly probable that the respondent’s entry had been sanctioned by the immigration authorities in Nairobi and that the immigration officer at Mombasa would in the natural course have been informed of this. It is not to be credibly supposed that the

immigration officer at the quayside would be left to decide in the hurly-burly of arrival whether to grant admission or not to a boy of fifteen on his own statements as to his parentage and qualifications for admission. The identical reference number on Hirji Nathoo's letter and on the respondent's immigration particulars shows that at some time they were connected.

After the respondent's arrival in Kenya in 1947, he is said to have lived with Hirji Nathoo for about two years only, after which he ceased so to do. He now has his own shop in Nairobi. Hirji Nathoo, his alleged adoptive father, has made no testamentary provision for him to benefit from his property after his (Hirji's) death.

Neither Hirji Nathoo nor the respondent ventured into the witness-box to substantiate the alleged adoption.

It is notorious that Indians in Kenya used to employ bogus adoption of sons as a device for defeating the immigration laws and that this practice was widespread. Numerous cases have been dealt with by the courts. It is difficult to recall a case in which the alleged adoption displayed fewer of the insignia of a genuine Hindu adoption than the present. The learned judge expressed an opinion that there was no reason, and certainly no reason had been established in evidence, to justify the court in entertaining a doubt as to the truth of Hirji Nathoo's statement that the respondent was his adopted son. With the greatest respect, the learned judge does not seem to have considered that almost all the signs of a genuine Hindu adoption were absent in this case and his attention was not drawn to *Hirji Devchand Ramji v. Attorney-General for Kenya* (3) as to the necessity for proof of a valid adoption and of the physical act of giving and taking the child.

In 1947 when the respondent was permitted to enter Kenya, the relevant regulation was reg. 3 of the Defence (Admission of Women and Children) Regulations, 1940. That regulation reads:

"3. Notwithstanding the provisions of the Ordinance, but subject to the provisions of these Regulations, no woman, or child, who has not attained the age of eighteen years (either of whom is hereinafter referred to as a 'person') may enter the Colony, whether by land, sea or air.

"Provided that, if the immigration officer is satisfied that any person comes within any of the categories specified in the Schedule hereto and is not a prohibited immigrant within the meaning of s. 5 of the Ordinance, he may permit such person to enter the Colony either unconditionally or for such period and subject to such conditions as the Governor may direct."

The relevant category in the Schedule was:

"(c) The children, who have not attained the age of eighteen years, of any person who is normally resident or employed in the Colony."

Section 8 of the Immigration Ordinance, 1956 (hereinafter called the Ordinance) provides:

"8. Any entry permit, pass, certificate or other authority, whether issued, granted or conferred under this Ordinance or under any regulations made thereunder or under any other law for the time being in force, whether or not since repealed, which is or was obtained by, or is or was issued, granted or conferred as a result or by reason of, fraud, or misrepresentation or concealment or non-disclosure, whether intentional or inadvertent, of any material fact or circumstance shall be and be deemed always to have been null, void and of no effect."

Section 18 (2) of the Ordinance is as follows:

“The burden of proof that any person is not or was not, at any time before or after the commencement of this Ordinance, a prohibited immigrant or that the entry, presence or residence in the Colony of any person is or was at any such time lawful, shall lie on that person.”

The learned trial judge considered that the facts of the present case were similar to the facts in *Ex parte Bhagubhai Bhanabhai* (4) (1954), 27 K.L.R. 134. He doubted whether the words “or other authority” in s. 8 covered the permission to enter Kenya given by an immigration officer under the Defence (Admission of Women and Children) Regulations, 1940. He held that once it was established or admitted that the plaintiff duly reported to the immigration officer and was permitted by him to enter the Colony under the Defence (Admission of Women and Children) Regulations, 1940, the onus upon the plaintiff of proving that he was not a prohibited immigrant had been *prima facie* discharged and that thereafter the onus of establishing that the case came within the provisions of s. 8 of the Ordinance lay upon the person who asserted that that was so (that is the Attorney-General), at least to the extent of raising a *prima facie* case; and he thought that in the present case the Attorney-General had not sufficiently discharged that onus.

In *Ex parte Bhagubhai Bhanabhai* (4), Bhanabhai was shown to have entered the Colony, at the age of just under eighteen years, under the Defence (Admission of Women and Children) Regulations, 1940. He had been permitted to enter on the ground that he was one of the children of one Somabhai who was normally resident in the Colony. In fact, he was the adopted son of Somabhai. The facts in *Bhanabhai's* case (4) differed in a vital particular from the facts in the present case in that it was not shown that either Bhanabhai or Somabhai had made a representation to any immigration officer that Bhanabhai was a natural child of Somabhai: there was no evidence to show that the immigration officer had not been told that he was an adopted son. It was held that:

“(1) ‘Children’ in item (c) of the Schedule to the Defence (Women and Children’s) Regulations, 1940, means legitimate issue of the first generation and does not include an adopted child; (2) Regulation 3 of the Regulations did not say that only women or children who fell within the scheduled categories might be admitted; but that if an immigration officer was satisfied that any person came within any of the scheduled categories, he might permit that person to enter. Once an immigration officer was satisfied and an entry pursuant to his permit had been made, that entry was lawful; provided that the permit had not been induced by misrepresentation, wilful concealment of a material circumstance or fraud, and provided that no grounds were shown which would ordinarily be a reason for upsetting a decision reached in the exercise of a statutory discretion, such for instance, as bias, or the declining of jurisdiction because extraneous matters had been taken into account. In the absence of any such ground, the decision of the immigration officer made in the bona fide exercise of his discretion could not, years later, be upset; (3) That in *Bhanabhai's* case, the immigration officer must be taken to have been ‘satisfied’; and there was no evidence of misrepresentation, wilful concealment or fraud, or any suggestion of bias or of an improper exercise of his discretion by the immigration officer in granting the applicant permission to enter the Colony. Accordingly, the applicant’s entry was a lawful entry.”

The facts in the present case are (as already mentioned) vitally different from those in *Bhanabhai's* case. There was no representation in *Bhanabhai's* case that the immigrant was the son of a resident in the Colony.

In *Keshavlal Punja Parbat Shah v. The Superintendent of H.M. Prison, Nairobi, and Another* (5) (1955), 22 E.A.C.A. 218, it was held that there was no

express requirement that permission to enter Kenya under the Defence (Admission of Women and Children) Regulations must be in writing, except where permission for the immigrant's entry was conditional. It was also held that where permission to enter Kenya is given in consequence of an innocent misrepresentation, the immigration officer is entitled to revoke his permission on discovering the misrepresentation; but, in the meantime, the permission remains valid: accordingly, if the immigrant's misrepresentation remained undiscovered until he had been in Kenya for long enough to acquire the status of a permanent resident, he could not be deported. The effect of that part of the decision in Keshavlal's case was nullified in 1956 by the enactment of s. 8 of the Ordinance which has already been quoted. I entertain no doubt that the words of that section, "Any entry permit, pass, certificate or other authority", are wide enough to include an immigration officer's permission to enter the Colony under reg. 3 of the Defence (Admission of Women and Children) Regulations, 1940.

In *Hirji Devchand Ramji v. The Attorney-General for Kenya* (3), the facts were very similar to those of the present case. The appellant in that case was the natural son of M., an Indian living in India, and was born there. In 1949 D., a brother of M., who had lived in Kenya since 1919, purported to adopt the appellant as his son. A ceremony of a kind was held in India but D. was not present. In 1947 D. obtained for the appellant a permit to enter Kenya under the Defence (Admission of Women and Children) Regulations, 1940, and the appellant entered Kenya. He was then under the age of eighteen and had resided in Kenya ever since. In the application for the entry permit D. described the appellant as his child. The appellant applied to the Supreme Court for a declaration that he was a permanent resident in Kenya. His application was refused. The only material difference between those facts and the facts of the present case is that in Ramji's case it was definitely proved that a permit had been obtained as a result of the appellant's application.

It was held by this court:

- (1) If the appellant was legally adopted by D. this occurred only after the appellant's entry into Kenya, the previous ceremony being ineffective in Hindu law.
- (2) Even if a legally adopted child may accurately be described as the child of the adoptor and even if the above Regulations can cover a legally adopted child, the appellant was not legally adopted at the time of declaration and entry.
- (3) The entry permit having been obtained by deliberate and material misrepresentation, a lawful entry could not be effected under it. The appellant's entry was unlawful and his residence in Kenya was without lawful authority.

Jenkins JA: quoted from the judgment in *Bhanabhai's* case (4), in particular, the sentence:

"If it is afterwards discovered that the immigrant has got in on some material misrepresentation, wilful concealment or fraud, or that there was an improper bias on the part of the immigration officer, that would be very different. There is, however, no such allegation here, and it is not shown in this case that the immigration officer was not informed that the applicant was an adopted son."

and continued at p. 23:

"It is in the last respect that the instant case differs from *Bhagubhai's* case. In the latter case there was no evidence to show that the immigration officer was not informed that the immigrant was an adopted son. The court, therefore, would not upset the exercise by the immigration officer

of his discretion in being satisfied that the immigrant was a child under category (c). The evidence in the instant case is vitally different on this point. The application by Devchand Ramji describes the appellant not as his adopted son but as his child. The instant case, therefore, comes directly within the first part of the proviso in the passage quoted by appellant's advocate from the *Bhagubhai* case. The immigration officer did not exercise his discretion on true facts supplied by the applicant, but on a misrepresentation, viz. that the intended immigrant was a child of the applicant, whereas in fact, as the learned trial judge has found, the appellant was not at the date of entry even an adopted son.

.....

"It follows that the appellant's entry into the Colony, being based on a permit obtained by a material misrepresentation, was unlawful . . . In any event, no authority has been cited to us which would constrain us to hold that an adopted son of a Hindu resident of Kenya, even if validly adopted under Hindu law, is a 'child' of such resident within the meaning of category (c) of the Kenya Defence (Admission of Women and Children) Regulations, 1940."

The appeal was dismissed. In my opinion, that reasoning applies with full force to the present case.

It is said, however, that there is no evidence in the present case that Hirji Nathoo's letter of January 24 to the immigration officer, Nairobi, containing the misrepresentation that the respondent was his son, was sent to the immigration officer at Mombasa. I think that there was some evidence from which it might have been inferred that this letter was passed on to the immigration officer at Mombasa. But, in my opinion, if a misrepresentation has been made to the head of a department it is not to be presumed in the absence of evidence that that information was not in the possession of a subordinate officer of that department who actually dealt with the matter. A fortiori where a legal burden of proof is cast upon the applicant. Moreover, in the present case, as in *Ramji's* case (3), it was not even proved that the respondent was an adopted son of Hirji Nathoo.

In *Chimanlal Motibhai Hira Patel v. The Attorney-General* (6), [1960] E.A. 388 (C.A.), the appellant was a son of Hirabhai, a resident of India, and alleged that he was the adopted son of Motibhai, a resident of Kenya, a brother of Hirabhai. On March 10, 1947, Motibhai wrote a letter to the immigration officer, Nairobi, in which he asked for an entry permit for "my son Chimanbhai, son of Motibhai Hirabhai Patel". A letter was written in reply by the immigration officer to the effect that there would be no objection under the Defence (Admission of Women and Children) Regulations, 1940, to the entry into Kenya "of your son Mr. Chimanbhai" provided that he was under eighteen and complied with the provisions of the Immigration Restriction Ordinance.

Again, the facts are similar to those of the present case except that the reply of the immigration officer to the application was in evidence. It was not specifically proved that the authorisation to enter granted by the immigration officer in Nairobi had been communicated to the immigration officer at the quayside at Mombasa. In that case, as in the present case, it was argued, *inter alia*, that as the appellant had "satisfied" the immigration officer, his entry was *prima facie* lawful and *Bhanabhai's* case (4) was cited. It was admitted that he was not a true child of Motibhai; but it was said that (as his entry was *prima facie* lawful) the onus was on the Crown to show that his entry was unlawful, i.e. to show that he was not an adopted child, and it was said that the Crown had not shown that. That argument was rejected. An extract from the leading judgment reads at p. 391:

“One reason, and probably the main reason, why the immigration officer was ‘satisfied’ that the appellant came within a permitted category of immigrant was the letter from Motibhai stating that the appellant was his son. It is now admitted that the appellant was not Motibhai’s true son. The statement that the appellant was a son was a misrepresentation at the time that it was made: *Bhagubhai’s* case (supra). If it could be cured by ex post facto legislation (a point which I find it unnecessary to decide) the representation was still a misrepresentation unless the appellant was an adopted son. In my opinion, the onus of proving this fact was and remained on the appellant. Section 18 of the Immigration Ordinance, 1956, provides in sub-s. (1), among other things, that a certificate signed by any of the persons indicated shall be admissible as evidence of ‘(c) the relationship by blood, marriage or adoption’ of any person mentioned in the certificate to any other person. Sub-section (2) (so far as relevant) provides that the burden of proof that any person is not, or was not at any time before the commencement of the Ordinance, a prohibited immigrant or that the entry of any person is or was at any such time lawful, shall lie on that person. This was a re-enactment and amplification of a previous provision—s. 5 (2) of the Immigration Control Ordinance which was in force in 1947 when the appellant entered the Colony and which provided that the burden of proving that any person was not a prohibited immigrant lay on that person. There is no doubt that under both these provisions the burden of proving that his entry was lawful rested upon the appellant and not upon the Crown. Apart from these provisions, that would be the position in civil proceedings, under s. 106 of the Indian Evidence Act, as replaced by s. 3 of the Evidence Act (Amendment) Ordinance (Cap. 12). The burden of proving that the appellant was an adopted son of Motibhai would rest upon him as being a fact especially within his (or his own family’s) knowledge. The Crown could not possibly discharge such an onus with regard to immigrants . . . There was nothing in this case to shift the onus of proof from the appellant. On this evidence the learned judge refused to find that the appellant was an adopted son. That was a conclusion of fact with which this court should not interfere without good reason. I see no reason whatever for interfering with it: in fact I agree with the learned judge’s finding.”

In *Chimanlal’s* case (6) the trial judge refused to find that the appellant was an adopted son. In the present case there is no definite finding. The learned judge did express the opinion that there was no reason to doubt Hirji Nathoo’s statement that the respondent was an adopted son; but that opinion is vitiated by the failure to consider whether the essentials of a valid Hindu adoption had been shown and by what, with great respect, was, I think, an erroneous direction as to the onus of proof. The learned judge said:

“I am satisfied that once it is established or admitted that the plaintiff duly reported to the immigration officer and was permitted by him to enter the Colony under the Defence (Admission of Women and Children) Regulations, 1940, the onus upon the plaintiff of proving that he is not a prohibited immigrant has been *prima facie* discharged and that thereafter the onus of establishing that the case comes within the provisions of s. 8 of the Immigration Ordinance lies upon the person who asserts that this is so, at least to the extent of raising a *prima facie* case.”

That may well be correct in a case where no misrepresentation has been proved to have been made: *Bhanabhai’s* case (4). It is correct that, in such a case, the provisional burden of proof depending on the state of the evidence, which Lord Denning, in *Huyton-with-Roby U.D.C. v. Hunter* (7), [1955]

2 All E.R. 398; and *Dunn v. Dunn* (8), [1948] 2 All E.R. 822, distinguished from the legal burden of proof, is shifted by showing that the immigration officer at the port of entry was satisfied that the immigrant's entry was lawful. That would not shift the legal burden of proving that the immigrant was not a prohibited immigrant at the time of first entry which, under s. 18 (2) of the Ordinance, remains upon the immigrant and does not shift, so that at the end of the case it would be the duty of the judge to ask himself: "Has that burden been discharged?": *Dunn v. Dunn* (8). In *Bhanabhai's* case (4) it was held that it had been discharged. But, where it is proved that there has been a prior material misrepresentation to the Immigration Department (whether to the head office or to the immigration officer at the port of entry), not even the provisional burden of proof is shifted: the burden of proof that the immigrant is not, or was not when he entered, a prohibited immigrant and that his entry and presence in the Colony was and is lawful, rests squarely upon the immigrant under s. 18 (2) of the Ordinance: *Ramji's* case (3) and *Chimanlal's* case (6).

That onus was not discharged by the respondent in this case.

It remains to deal with one further argument advanced on behalf of the respondent. This was based on s. 3 (1) of the Interpretation and General Provisions Ordinance, 1956, which, so far as material, reads:

"3.(1) In this Ordinance and in every other written law, other than an imperial enactment, and in all public documents enacted, made or issued before or after the commencement of this Ordinance, the following words and expressions shall have the meanings hereby assigned to them respectively . . . 'son', in the case of any person whose personal law permits adoption includes an adopted son."

It was argued that, in view of this, Hirji Nathoo's statement in his letter of January 24, 1947, that the respondent was his son was not a misrepresentation. It is only necessary to point out (a) that s. 3 (1) of the Interpretation and General Provisions Ordinance, 1956, does not apply to letters unless they are public documents; and (b) that the word in the Defence (Admission of Women and Children) Regulations, 1940, is not "son". In my opinion the definition of "son" has no application in the present case. I incline to the view also that a misrepresentation which was a misrepresentation at the time would not be cured by ex post facto legislation, unless that legislation was specifically directed to it. I agree with the learned judge in rejecting this argument.

I would allow the appeal with costs here and below and grant the declarations claimed by the appellant.

Sir Alastair Forbes VP: I agree and have nothing to add.

Sir Owen Corrie Ag JA: I also agree.

Appeal allowed. Declaration claimed by the appellant granted.

For the appellant:

JS Rumbold (Crown Counsel, Kenya)

For the respondent:

J Gledhill

For the appellant:

Advocates: *The Attorney-General*, Kenya

For the respondent:
Gledhill & Co, Nairobi

Nasanairi Nserikomawa and another v Taibu Lwanga and another
[1961] 1 EA 119 (HCU)

Division: HM High Court of Uganda at Kampala
Date of judgment: 3 March 1961
Case Number: 2/1960
Before: Sir Audley McKisack CJ

[1] *Jurisdiction – Partnership – Action between partners – Action brought in High Court – All parties African – Application to transfer to Principal Court of Buganda – Jurisdiction – Buganda Courts Ordinance (Cap. 77), s. 7, s. 9 and s. 12 (U.).*

Editor’s Summary

The plaintiffs, who were partners in a firm, had sued the defendants, who were two other partners of the firm, for Shs. 43,000/– alleged to belong to the firm and to have been converted by the defendants to their own use. All the parties were Africans. On the application by one of the defendants to transfer the case to the Principal Court of Buganda under s. 7 of the Buganda Courts Ordinance it was submitted *inter alia* that the application was misconceived as the suit had been taken under the Partnership Ordinance which the Principal Court had no jurisdiction to try.

Held –

- (i) although the partners were trading under a firm name and were registered under the Business Names Registration Ordinance these facts did not constitute “proceedings taken under” that Ordinance.
- (ii) the Partnership Ordinance is not restricted in its application and applies generally to African partnerships as well as others; the suit was “taken under” the Partnership Ordinance for the purposes of s. 9 of the Buganda Courts Ordinance and, therefore, the Principal Court would have no jurisdiction.

Application dismissed.

Cases referred to:

- (1) *Fabiano Bukenya v. David Mutebi*, [1959] E.A. 366 (U.).
- (2) *Kibalama and Others v. Basazemagya and Others* (1944), 6 U.L.R. 137.
- (3) *Mengo Builders and Contractors Ltd. v. Kasibante*, [1958] E.A. 591 (U.).

Judgment

Sir Audley McKisack CJ: This is an application by one of the two defendants in the suit for the transfer of the case to the Principal Court of Buganda. The application is made with reference to s. 7 of the Buganda Courts Ordinance (Cap. 77 of the Laws of Uganda) which provides that:

“Where any proceedings of a civil or criminal nature which a court has jurisdiction to try are commenced in a subordinate court or the High Court, they shall be transferred for hearing to a court having jurisdiction.”

(the term “a court” in this Ordinance means a court established under the Ordinance and includes the Principal Court).

The suit is brought by two persons suing on behalf of themselves and other partners in a firm called Nakifuma Kasawo Galyawamu Company against two other partners in that firm. The claim is for some Shs. 43,000/– alleged to belong to the firm, and this sum is said to be made up of cash in hand and of the value of a bus and certain parcels of land, all of which belonged to the firm, and the proceeds of the sale of which are said to have been converted by the defendants to their own use.

The firm in question is said to have been registered under the Business Names Registration Ordinance (Cap. 213 of the Laws of Uganda).

An affidavit by the applicant's advocate in support of this application includes the following paragraphs:

- "3. That all parties in these proceedings are Africans as defined in Buganda Courts Ordinance and as such under s. 7 of the Buganda Courts Ordinance the subject matter of the suit is justifiable by the Principal Court of Buganda.
- "4. That the subject matter of the suit refers to the partnership affairs between the plaintiffs and the defendants and such forms of business activities are well known amongst the Africans of the Buganda Province.
- "5. In all the circumstances it is just and proper that the proceedings be transferred to the Principal Court of Buganda under s. 7 of the Buganda Courts Ordinance which is mandatory in its application."

Mr. Mukasa for the plaintiffs/respondents opposes the application on two grounds. One is that the suit is founded on the Business Names Registration Ordinance, and this is not one of the Ordinances which the Buganda courts have been authorised to administer under the provisions of s. 12 of the Buganda Courts Ordinance; consequently, by virtue of s. 9 of the Buganda Courts Ordinance, which excludes from the jurisdiction of those courts "proceedings taken under any Ordinance" which they have not been authorised to administer, the Principal Court would not have jurisdiction in this suit. I am unable to agree with this contention. The mere fact that the partners are trading under a firm name, and are consequently registered under the Business Names Registration Ordinance, does not constitute this suit "proceedings taken under" that Ordinance. This view seems to me to accord with what Lewis, J., said in *Fabiano Bukenya v. David Mutebi* (1), [1959] E.A. 366 (U.) at p. 367:

"Under what circumstances is a plaintiff justified in saying that the proceedings are 'taken under' this or that Ordinance or English Common Law? I think the answer is to be found in the form in which his claim is framed. The plaintiff sued the defendants for the return of Shs. 4,200/- and pleaded a written agreement embodying the contract. The Sale of Goods Ordinance is not mentioned, and so far as I can see need never be invoked. As the final court of appeal for cases from the African courts I know that many cases of this nature are tried by such courts. It is extremely difficult to say with certainty what suits are, and what suits are not, triable by African courts. The pleadings of course are a guide, but not conclusive. It depends, I think, whether a plaintiff has to plead and invoke a particular section of an Ordinance to succeed. No general rule can be laid down."

Mr. Mukasa has, however, relied on another and more substantial ground of objection. He says that this is a suit "taken under" the Partnership Ordinance (Cap. 209 of the Laws of Uganda), and he has referred me to *Kibalama and Others v. Basazemagya and Others* (2) (1944), 6 U.L.R. 137. That was a suit brought by two partners in a firm against seven other partners, all of whom were Africans. The claim was for the taking of accounts, the dissolution of the partnership and the appointment of a receiver. The defendants took the preliminary objection that the High Court had no jurisdiction, since it was a suit which, by virtue of s. 7 of the Buganda Courts Ordinance, had to be transferred to the Principal Court of Buganda. The application failed, Manning, Ag. C.J., holding that the suit was taken under the English Partnership Act (which he held to be a statute of general application; the Partnership Ordinance had not yet been brought into force). In the course of his ruling he said as follows at p. 138:

“I find myself in agreement with Mr. Patel—for obvious reasons of policy most systems of law have found it necessary to have a definite code to regulate the rights of partners among themselves and to protect the public in its dealings with partnerships.

“I have no doubt that the Partnership Act, 1890, is a Statute of general application and that it is in force in the Protectorate, and I am satisfied that there is no native customary law capable of dealing with the problems which arise when accounts have to be taken, a dissolution decreed, or a receiver appointed. If this case came before a native court it would have (to use the peculiar wording of the Ordinance) to ‘administer’ the Partnership Act and the English law of Partnership as laid down in a large number of decided cases. Natives who are members of a firm have, in my opinion, a right to invoke the provisions of English law to protect themselves and to ascertain their rights, and it was precisely this kind of case that s. 9 of the Buganda Courts Ordinance contemplated when it excluded from the jurisdiction of native courts proceedings ‘taken under’ any English law unless such jurisdiction was expressly conferred by an Ordinance.

“This is therefore not a case which has to be transferred to a native court.”

Mr. Verjee, for the applicant, seeks to distinguish that decision, pointing out that the suit in the instant case is not for an account, or dissolution, or appointment of a receiver, but is a claim for a sum of money. The Partnership Ordinance, however, contains nothing restricting its application, and it therefore applies (subject to any relevant customary law to which the courts would have to have regard by reason of art. 20 of the Uganda Order-in-Council, 1902) to partnerships whose members are all Africans as much as to partnerships otherwise constituted. Mr. Verjee may be correct in saying (in his affidavit) that business activities in the form of partnerships are well-known amongst the Africans of Buganda; but his affidavit does not state—and, so far as I know, it could not correctly state—that there is any Buganda customary law governing such questions as whether a partnership exists, what are the liabilities of the partners as among themselves, and what property is, or is not, partnership property. All those questions are dealt with in the Partnership Ordinance. And, looking at the plaint, it seems to me that this suit is of a kind which must inevitably require the court to determine one or more of such questions. Consequently, at the trial of this suit it will be necessary to invoke the provisions of the Partnership Ordinance (which the Buganda courts have not been empowered to “administer”). I am of opinion, therefore, that, for the purposes of s. 9 of the Buganda Courts Ordinance, this is a suit “taken under” the Partnership Ordinance, and the Principal Court would not have jurisdiction to try it. This application accordingly fails. It is dismissed with costs, and the proceedings will continue in the High Court.

I think it is apposite to refer to the history of certain proceedings relevant to this case. Proceedings were brought in the Principal Court of Buganda in 1954 (Civil Case No. 66 of 1954) by a partner in the same firm which is involved in the instant case, against two other partners who are also the defendants in the instant case, claiming property said to belong to the firm. The Principal Court held, however, that it had no jurisdiction to hear the suit since the plaintiff was what the court termed (according to a translation of the court’s order) “a registered company”, and the court referred to a decision of mine in *Mengo Builders and Contractors Ltd. v. Kasibante* (3), [1958] E.A. 591 (U.). But what I there held was that the Buganda courts had no jurisdiction where a party was a company incorporated under the Companies Ordinance, even though all its members were Africans. I did not hold (as the Principal Court seems to think I did) that the Buganda courts have no jurisdiction in the case

of Africans, as defined in the Buganda Courts Ordinance, if they are partners in a firm registered under the Business Names Registration Ordinance.

Application dismissed.

For the plaintiff:

AWK Mukasa

For the first defendant:

BKS Verjee

For the plaintiffs:

Advocates: *Kiwanuka & Co*, Kampala

For the first defendant:

Verjee & Verjee, Kampala

The Liquidator of Sheikh Brothers Limited v Sheikh Abdul Rashid [1961] 1 EA 122 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	24 January 1961
Case Number:	90/1960
Before:	Sir Kenneth O'Connor P, Crawshaw JA and Sir Owen Corrie Ag JA
Appeal from:	H.M. Supreme Court of Kenya—Pelly Murphy, J

[1] *Company – Winding-up – Property of company – Liquidator taking into custody assets to which company appears entitled – Application for order to deliver and transfer sisal estate – Liquidator's claim to title and possession disputed – Purchaser of moiety of estate in possession without title – Whether liquidator entitled to possession – Companies Ordinance (Cap. 288), s. 188, s. 200 (K.) – Indian Transfer of Property Act, 1882, s. 55 (6) (b) – Registration of Titles Ordinance, s. 1 (2) (K.) – Companies (Consolidation) Act, 1908, s. 164.*

Editor's Summary

The liquidator of a company sought an order under s. 200 of the Companies Ordinance requiring the respondent to deliver and transfer to the liquidator a sisal estate with all money, property, books and papers in respect of the estate. In the company's statement of affairs the estate was shown as an asset and was also found by the liquidator to be registered in the name of the company. It was not disputed that the

respondent was in possession and from an affidavit and an exhibit thereto it was clear that the respondent claimed that four years before the winding-up he had agreed to purchase a moiety of the estate for Shs. 40,000/–, that he had paid this sum but the company had so far been unable to make out an unencumbered title; accordingly, the respondent claimed that under s. 55 (6) (b) of the Indian Transfer of Property Act he had a charge on the estate for a sum equal to the price he had paid and that in other proceedings the effect of the agreement to purchase and of the charge was awaiting decision. The judge who heard the application dismissed it on the ground that there was a dispute as to ownership and that the liquidator should have applied to the court for leave to institute proceedings to determine that dispute. On appeal, the liquidator relied on the Registration of Titles Ordinance as giving the company an indefeasible legal title to the property and submitted that the sole question was who had a *prima facie* right to the property. He also cited s. 188 of the Companies Ordinance.

Held –

- (i) there was a dispute as to the facts which could not be determined under s. 200 of the Companies Ordinance and if the court were to find on this application that the respondent was *prima facie* entitled to possession and the liquidator in other proceedings proved the facts were different it would mean that the time of the court hearing the application had been wasted and its

decision, based on what were subsequently found to be wrong facts, was on the true facts incorrect.

- (ii) each such application had to be decided on the particular circumstances relating to the property concerned and the nature of the dispute and in the circumstances the judge was correct in dismissing the application.

Appeal dismissed. Order of the Supreme Court as to costs varied.

Cases referred to:

- (1) *Re Palace Restaurant Ltd.*, [1914] 1 Ch. 492.
- (2) *Re Oakwell Collieries Co.*, [1879] W.N. 65.

January 24. The following judgments were read:

Judgment

Crawshaw JA: This is an appeal by the liquidator of Sheikh Brothers Limited (hereinafter referred to as the company) against the dismissal by the Supreme Court of his application for an order under s. 200 of the Companies Ordinance (Cap. 288). The section reads:

“200. The court may, at any time after making a winding-up order, require any contributory for the time being on the list of contributories, and any trustee, receiver, banker, agent or officer of the company to pay, deliver, surrender or transfer forthwith, or within such time as the court directs, to the liquidator any money, property or books and papers in his hands to which the company is *prima facie* entitled.”

The liquidator, in his application dated May 4, 1960, had asked for an order requiring the respondent, as a director of the company

“to pay, deliver, surrender and transfer forthwith to the liquidator that estate known as the Masongaleni Sisal Estate together with all money, property, books and papers in respect of the said estate which is in his hands and to which the company is *prima facie* entitled”.

To his affidavit, also dated May 4, in support of the application, the liquidator attached an affidavit of April 2, 1960 (hereinafter referred to as the “first affidavit”), made by the respondent. It would seem that this first affidavit was made in respect of an earlier similar application by the liquidator under s. 200, but it is not clear from the record how that application was finally disposed of. In reply to the instant application, the respondent filed a new affidavit dated June 22, 1960 (hereinafter referred to as the “second affidavit”) in which he largely relied on his first affidavit.

It is not in dispute that the respondent was at the time of the application in possession of the estate, that he still is and has been since about May, 1958. The winding-up order was made on July 3, 1959. In the company’s statement of affairs the estate was shown as an asset of the company and was found by the liquidator to be in the name of the company in the register of titles. It had been so registered on December 5, 1942, and the company is still shown as the registered owner. Apart from a registered charge dated March 29, 1956, the only other entries on the register are a prohibitory order and caveat in 1957; the respondent agrees that he has no registered title or interest. In the circumstances the liquidator claimed that he was *prima facie* entitled to the property.

Annexed to the first affidavit is a copy of the respondent's written statement of defence in Civil Case No. 481 of 1958 which shows the registered mortgagee, Edward Sargent, as plaintiff, the company as first defendant, subsequently replaced by the liquidator, the trustees of the Sheikh Fazal Ilahi Sons (Marriage)

Trust, the fourth defendants, and the respondent, the fifth defendant; it was presumably a mortgage suit. As Mr. O'Donovan, who appeared before us for the liquidator, pointed out, the first affidavit does not specifically say that what is stated in the written statement of defence is true, but the affidavits would appear to adopt its contents. From the written statement read with the affidavits it is clear that the respondent alleges that about June, 1955, he agreed to purchase from the company a moiety of the estate for Shs. 400,000/- and that he paid this sum to the company, but that the company "has so far been unable to make out an unencumbered title"; and that by virtue of s. 55 (6) (b) of the Indian Transfer of Property Act, the respondent has therefore a charge on the estate for a sum equal to the price he paid. In paras. 12 and 13 of his first affidavit he states that the binding effect of the agreement to purchase and of the charge is a matter awaiting decision in Civil Case No. 481, and admits that he has been in possession of and has been operating the estate to his own personal advantage and benefit pursuant to the agreement. Paragraph 14 reads:

"That in view of the foregoing there is a pending dispute as to the proprietorship of the profits derived out of running of the said estate and that said dispute is not determinable summarily or at all by this honourable court on a mere application."

A copy of the alleged agreement was attached to the first affidavit. In his second affidavit the respondent not only claims a moiety of the estate but, rather astonishingly and without offering any reason, also claims "possession and use of the whole" of the estate and "the machinery, fittings and equipment" thereon, a claim which did not appear in his written statement. He also alleges that the liquidator knew that the Sheikh Fazal Ilahi Sons (Marriage) Trust claimed to be the co-sharer of the other undivided moiety of the said estate.

The learned judge in dismissing the application said:

"It seems to me that there is here a dispute as to ownership and that therefore there is no power under s. 200 to determine the dispute (*Re Palace Restaurant Ltd.* (1914), 1 Ch. 492). The liquidator should make an application to the court for leave to institute proceedings to determine that dispute. In my opinion the facts in the instant case are clearly distinguishable from those in *Re Oakwell Collieries Company* (1879) W.N. 65.

"This application is misconceived. The liquidator was fully aware of the respondent's claim to ownership and should not have persisted in this application. The application is therefore dismissed with costs against the liquidator."

Mr. O'Donovan maintains that, as the registered proprietor, the company has more than a *prima facie* right, it has an indefeasible legal title. He has referred to a number of sections in the Registration of Titles Ordinance, Cap. 160, which relate to the effect of being so registered and of being the holder of a certificate of title, to the restricted method of transferring any interest in or creating a charge over land, and to the exclusion, under s. 1 (2), of the provisions of any other Ordinance which are inconsistent with the Registration of Titles Ordinance. He argues, as I understand him, that the claims of the respondent, even if given the most liberal construction, give no right to legal possession, but raise issues which cannot properly be decided under s. 200, and which should be pursued by the respondent in proceedings separate from the instant application. He says that the sole question at this stage is, who has *prima facie* right to the property; if in law the respondent has a charge on it, transfer of possession to the liquidator would be subject to that charge.

In further support of the liquidator's application Mr. O'Donovan has referred to s. 188 of the Companies Ordinance which reads:

"188. Where a winding-up order has been made or where a provisional liquidator has been appointed, the liquidator, or the provisional liquidator, as the case may be, shall take into his custody, or under his control, all the property and things in action to which the company is or appears to be entitled."

This section is a general administrative direction to the liquidator and does not of course mean that he can, without an order of the court, take possession of property from another person, the right and title to which is disputed, merely because it appears to him that he is entitled thereto. The present application recognises this, and leaves it to the court, not the liquidator, to decide who is *prima facie* entitled.

It is common ground that there are matters in dispute and that the issues involved cannot properly be determined by the court on an application under s. 200, but it is claimed by the liquidator that he should be given possession of the property pending determination of those issues in other proceedings, on the ground that the company as the registered proprietor is *prima facie* entitled to the estate. Buckley on The Companies Acts (13th Edn.) at p. 537 says:

"generally the section is not applicable if a dispute is raised whether the company is entitled or not, there being nothing in the section empowering the court or the liquidator to determine that question".

The relevant note is to *Re Palace Restaurant Ltd.* (1), [1914] 1 Ch. 492, cited by the learned judge. In Halsbury's Laws of England (3rd Edn.), Vol. 6, note (q) at p. 617, it is said

"If there is a dispute as to ownership, there is no power to determine the dispute under this provision"

and reference is also made to the *Palace Restaurant's* case (1). In Atkin's Encyclopaedia of Court Forms and Precedents (1953 Edn.), Vol. 6A, there is a note on p. 419 referring to Halsbury's Statutes and to the *Palace Restaurant's* case (1) and saying,

"The liquidator could of course make an application to the court for leave to institute proceedings to determine the dispute".

In the *Palace Restaurant's* case (1) the solicitors of the company in liquidation held certain of the company's money against which they sought to set off costs incurred by them prior to the winding-up. The question in issue related to the power of the court sitting in winding-up proceedings to order taxation, but in the course of his judgment Buckley, L.J., on a suggestion by counsel that a person falling within s. 164 of the Companies (Consolidation) Act, 1908 (similar to our s. 200), would not be in the position of an ordinary creditor in that the court could call upon him to pay, said at p. 500:

"The court (s. 164) or the liquidator (s. 173) is entitled to call upon a person falling within s. 164 (and the solicitor falls within it) to pay any money to which the company is *prima facie* entitled. But if a dispute is raised whether the company is entitled or not there is nothing in the section empowering the court or the liquidator to determine that question. If the liquidator asserts against the solicitor that the solicitor is indebted to the company, that must be prosecuted I think in the same way as in the case of any other person. It may be therefore that the solicitors in the present case, when the liquidator's summons was issued, might have demurred to the jurisdiction. But they did not do so."

Mr. O'Donovan has submitted that these words are obiter and that the case there to be decided was different from that in the instant case, in that there the company had no *prima facie* right to the money, as the position could not be known until the solicitor's bill of costs had been taxed. I think that Mr. O'Donovan is correct, but it still leaves Buckley, L.J.'s general observation on the limited scope of s. 164.

Mr. O'Donovan cites *Re Oakwell Collieries Co. (2)*, [1879] W.N. 65, which was also referred to by the learned judge, in support of his argument. The circumstances there were the converse of the instant case, for it was the company which subsequently went into liquidation which had purchased the property (a colliery) from a director. The director alleged that the purchase money had not been paid in full and he retained possession. The liquidator applied to the court for an order for possession on the basis that the company was *prima facie* entitled to the property, and the Vice-Chancellor held that he had ample jurisdiction to make the order and ordered possession to be given to the liquidator, and accounts to be taken. Mr. O'Donovan has submitted that the liquidator's claim in the instant case is stronger than that of the liquidator in the *Oakwell* case (2) because of the Company's position under the Registration of Titles Ordinance. He draws a parallel between the two cases in that in each there was a dispute as to the right to possession, and he submits that there is a dispute in the instant case which could as well be settled after transfer of possession as in the *Oakwell* case (2). By analogy it could of course be argued that if possession was ordered where the purchase money had been paid in part only, as in the *Oakwell* case (2), a fortiori a purchaser would be entitled to possession where the purchase money had been paid in full, as in the instant case. Mr. O'Donovan, however, distinguishes the instant case on the basis of the difference between the law of real property in England, and the right of a purported purchaser under the Registration of Titles Ordinance.

Each application must of course be decided on the particular circumstances relating to the property concerned, and the nature of the dispute. Mr. O'Donovan has, quite rightly, said that although s. 200 does not provide for adjudication as to disputes, it would render the section ineffective if it were to be held that no order could be made merely because the application was opposed. One can imagine frivolous claims by a person coming within that section which a court would be entitled to ignore when considering *prima facie* entitlement. Buckley on The Companies Acts (13th Edn.) at p. 537 says:

"But the court would probably put a liberal construction on this section, as on s. 259 and s. 333, in order to bring within the winding-up jurisdiction any question properly cognizable. An order has been made upon a director to deliver possession of a colliery which he had contracted to sell to the company."

The claim of the respondent in the instant case is very different from that in any of the authorities cited to us. He alleges an agreement to purchase a moiety and produces a document which, he maintains, supports his claim. He alleges payment for the moiety in full, and that in pursuance thereof the company gave him possession of the property in May, 1958. Mr. O'Donovan's submission, of course, is that supposing all these facts are correct, even so the company has a *prima facie* title (and a fortiori an even stronger one if those facts cannot be supported by the respondent), and indeed an indefeasible one at law. Even supposing that there should prove to be no dispute as to the facts it is clear, however, that there is a substantial dispute as to the legal position on those facts. Neither Buckley, L.J., in the *Palace Restaurant's* case (1), nor the writers of the text-books cited supra, differentiate between disputes as to facts and disputes as to the effect and interpretation of the law on those facts. It is perhaps significant, however, that in the cases to which

we have been referred the only grounds on which the court has found that it has no jurisdiction, or that it should not exercise its jurisdiction, have been those in which the facts are in dispute; there is no suggestion that if the facts were clear, the court would fail to come to a finding on *prima facie* entitlement. It seems to me that the court on an application under s. 200 is as well able to apply the law as any other court.

To this extent I am of opinion that the learned judge perhaps went too far in saying without qualification,

“there is here a dispute as to ownership and that therefore there is no power under s. 200 to determine the dispute”.

The difficulty in the instant case, as I see it, is that the facts are not agreed, and Mr. O’Donovan himself admits that there are issues which cannot properly be determined by the court under s. 200. What I understand him to ask in effect is that these issues of fact should be determined in other proceedings, and that the court on this application should be asked to assume that the facts alleged by the respondent are correct and to determine on those facts whether, as submitted by the liquidator, the company is *prima facie* entitled at law to possession. This seems to me a highly undesirable approach, and one which the court should not adopt. It might for instance result in the court finding that the respondent was *prima facie* entitled to possession, and the liquidator in other proceedings proving that the facts were different from those claimed by the respondent with the result that the liquidator was entitled to possession. This would mean that the time of the court hearing the application under s. 200 had been wasted, and its decision, based on what were subsequently found to be wrong facts, was on the true facts incorrect.

In the circumstances I think that the learned judge was correct in dismissing the application.

As to costs, I do not think that this was an occasion on which to order that they be paid by the liquidator personally. He took a certain view, which I have no doubt was entirely bona fide, and in the interests of the company and the creditors, as he thought, he sought an order of the court as their trustee. With respect, I do not think the liquidator’s position in the rather unusual circumstances of this case was quite so simple as the learned judge appeared to regard it. I would alter the order of the court below to the extent that the costs be paid by the liquidator in his representative capacity, and I would order that the costs of the appeal be paid in the same way.

This leaves the question of the costs of the preliminary objections to this appeal. The main objection was that leave to appeal was necessary against the dismissal of the application, and was obtained only in respect of the order that costs be paid by the liquidator personally. Following the written order dismissing the application the record continues:

“Order: Certificate for two counsel refused.

Hearn: Applies for costs of application be paid out of assets. Bona fide application.

Khanna: Opposes.

Application refused.

Leave to appeal.”

Inquiry was made and the learned judge has informed us that the leave to appeal was in respect of the dismissal of the application as well as to the order as to costs, and the liquidator informs us that this is what he had asked for. Mr. Khanna did not appear to have appreciated this at the hearing, but has accepted the explanation of the learned judge. The liquidator has associated

himself with Mr. Khanna's observations that the record should have been more explicit as to the terms of the order, and I agree.

A further objection was that the memorandum of appeal did not state that leave had been granted, in accordance with the practice of the court (Practice Note No.4 of 1955). The liquidator has expressed regret, saying that he was unaware of the practice. We did not think that this was a ground on which to dismiss or adjourn the hearing of the appeal.

The third objection was that a letter had been omitted from the appeal record. The liquidator concedes that it was wrongly omitted, and we allowed it to be admitted at the hearing without objection.

Mr. Khanna has said that had the memorandum stated that leave to appeal had been obtained, he would have investigated the matter and as a result would not have raised it. He was, however, present in court when leave was granted, and I would make no order as to costs in respect of this objection. I would order that the costs of the other two grounds of objection be paid by the appellant; also in his representative capacity.

Sir Kenneth O'Connor P: I agree with the conclusions of the learned Justice of Appeal. The appeal will be dismissed and there will be orders as proposed by him.

Sir Owen Corrie Ag JA: I also agree.

Appeal dismissed. Order of the Supreme Court as to costs varied.

For the liquidator:

Bryan O'Donovan QC and HP Hearn

For the respondent:

DN Khanna and Swaraj Singh

For the appellant:

Advocates: *HP Hearn*, Nairobi

For the respondent:

Swaraj Singh, Nairobi

Mrs PF Hayes and others v CJ Patel and another
[1961] 1 EA 129 (SCK)

Division:	HM Supreme Court of Kenya at Nakuru
Date of judgment:	26 March 1957
Case Number:	173/1956
Before:	Sir Kenneth O'Connor CJ

[1] *Damages – Assessment – Negligence – Fatal accident – Computation of damages – Fatal Accidents Ordinance (Cap. 9), s. 4 (K.) – Fatal Accidents Act, 1846, s. 2, s. 3 – Fatal Accidents (Damages) Act, 1908, s. 1.*

Editor's Summary

The first plaintiff was the widow and the second and third plaintiffs were the children of a farmer and all three were passengers in a car driven by the farmer which was in collision with a lorry. The farmer was killed and the plaintiffs were injured. The plaintiffs sued the first defendant as owner and the second defendant as driver of the lorry alleging that the accident was caused by the negligence of the second defendant. The trial judge having held that negligence had been proved as alleged, then considered the authorities upon the assessment of damages under s. 4 of the Fatal Accidents Ordinance.

Held –

- (i) the assessment of damages for the death of a husband and father of small children should start with ascertainment of the age and expectation of working life of the deceased and the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion thereof which he would have made available for his dependants.
- (ii) in this way the annual value of the dependency should be arrived at, and this must then be capitalised by multiplying the annual value by so many years purchase.
- (iii) the multiplier will bear a relation to the expectation of working life of the deceased and the expectation of life and dependency of the widow and children.
- (iv) the capital sum so reached should then be discounted to allow for the prospect of the widow's remarriage, and, in certain cases, of the acceleration of the receipt by the dependants of what the deceased left to them respectively; the resulting sum (which will depend on a number of estimates and imponderables) will be the lump sum to be apportioned among the dependants.

Judgment for the plaintiffs. Damages under the Fatal Accidents Ordinance assessed at £12,000, whereof £6,000 apportioned to the first plaintiff and £3,000 each to the second and third plaintiffs. Special and general damages awarded in addition.

[**Editorial Note:** This decision hitherto not reported has been cited so often since 1956 that it is now included here by direction of the Editorial Board.]

Cases referred to:

- (1) *Trimble v. Hill*, [1879] 5 A.C. 342.
- (2) *Nadarajan Chettiar v. Walauwa Mahatmee*, [1950] A.C. 481.
- (3) *Davies v. Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601; [1942] 1 All E.R. 657.
- (4) *Woodroff v. National Coal Board* (1954), C.A. No. 58, referred to in Kemp and Kemp on The Quantum of Damages, Vol. 2 at p. 66.
- (5) *Zinovieff v. British Transport Commission*, referred to in Kemp and Kemp on The Quantum of Damages, Vol. 2 at p. 81.
- (6) *Roughhead v. Railway Executive* (1949), 65 T.L.R. (R.) 435.

(7) *Grand Trunk Railway Co. of Canada v. Jennings*, [1888] 13 A.C. 800.

(8) *Nance v. British Columbia Electric Railway Co. Ltd.*, [1951] A.C. 601; [1951] 2 All E.R. 448.

Judgment

Sir Kenneth O'Connor CJ: The first plaintiff is the widow and administratrix of Henry Albert Hayes, deceased. The second and third plaintiffs are minor daughters, aged respectively ten and seven, of the first plaintiff and sue through her as their next friend.

The first defendant is a transporter and general merchant and was, on April 11, 1956, the owner of a five-ton Austin lorry No. KDA 452. The second defendant was, on April 11, 1956, a driver employed by the first defendant and was on that date at the material time driving the lorry KDA 452. It is admitted by the defendants that the second defendant drove the lorry in the course of his employment by the first defendant.

The claim of the plaintiffs is in respect of a collision which took place about 4.45 p.m. on April 11, 1956, between a Chevrolet car No. C 2610, in which the plaintiffs were travelling and which was being driven by the late husband of the first plaintiff, Mr. H. A. Hayes, and the lorry KDA 452, driven by the second defendant. In this collision Mr. Hayes was killed and the plaintiffs suffered injury and damage.

Each of the plaintiffs claims special and general damages for the injuries caused in the collision; and the first plaintiff as administratrix claims damages for the death of Mr. Hayes, under the Fatal Accidents Ordinance (Cap. 9) on behalf of herself as widow and of the two minor children of Mr. Hayes.

The issues, as agreed by counsel are:

- (1) Was the accident caused by the negligence of the second defendant?
- (2) If so, what is the quantum of general damages for—
 - (a) the death of the deceased;
 - (b) the injuries suffered by the three plaintiffs?

The special damages as set out in the plaint have been agreed by the defendants and these are no longer in issue. It has also been agreed that the first plaintiff is the administratrix of the deceased and that the second defendant was acting within the scope of his employment by the first defendant when the accident occurred.

The first plaintiff, Mrs. Hayes, whom I regard as a careful and truthful witness, stated that she was thirty-four years of age and had been married to the deceased in December, 1945. The second and third plaintiffs are her daughters. Her husband, the deceased, was the main shareholder in Kedowa Estates, Ltd., a “one-man company” farming at Kedowa. He devoted his whole time to the farm and the profits made from the farm were the means of the family’s livelihood; they had no other source of income. Her husband used to send sums periodically to his mother in South Africa amounting, perhaps, to £60 per annum. The remainder of her husband’s income was applied to the support of his wife and children. Prior to her husband’s death, the children were schooling at Nakuru, the school fees being paid by her husband.

Mrs. Hayes said that at about 4.45 p.m. on April 11, 1956, she was a passenger in their Chevrolet boxbody car No. C 2610 driving from Molo to Mau Summit. The car was driven by Mr. Hayes. Mrs.

Hayes was sitting beside him in the front seat and the two daughters were behind. They were travelling on their left-hand side, up an incline approaching a right-handed corner in second

gear at a slow rate. As they climbed the hill a lorry came round the corner at a high speed on the wrong side of the road. The driver tried to swerve to avoid them, but did not seem able to do so. She can remember hearing a smash. An African came to the door to help them out. The children were carried to the side of the road. They and the witness were injured and Mr. Hayes was dead. The front of the lorry was right into the front of the car. Some time later a car passed, driven by a European who, the witness afterwards learned, was a Mr. Owens. He took Mrs. Hayes and the children to hospital in Nakuru, where they were treated by Dr. Johnson.

Mrs. Hayes was suffering from shock, two fractured ribs, multiple bruises, a broken upper incisor tooth, a lacerated lip and a sprained thumb. She was in hospital till May 5, 1956, i.e. twenty-three or twenty-four days.

The second plaintiff, Margaret Hayes, was suffering from shock, a cut one inch long on her scalp, bruising of the face and many cuts and gashes on right arm and shoulder. She is left with a permanent disfigurement on the front and outer side of her right shoulder and arm. She was discharged from hospital on April 27, 1956, i.e. after sixteen days.

The third plaintiff, Anne Hayes, was suffering from severe shock, two wounds on right forearm and a gash three inches long, starting in right eyebrow and passing up to left across her forehead. Under this was a depressed fracture of the skull one inch in diameter. An operation was performed; the depressed fragments were removed and the various wounds were sutured. The patient was discharged on May 5, 1956, i.e. after twenty-four days. Dr. Johnson says in his report (which was put in by consent) that she is left with permanent disfigurements, i.e. the scar of the wound across her forehead 2 1/2 inches long, and two scars on her right forearm. The doctor further states that the opening in the skull may become more obvious with time as a depression under the skin.

Mr. Owens' evidence (which had been taken *de bene esse* and was put in by consent) was to the effect *inter alia* that he went to the scene of the accident and saw an Austin lorry very much on its wrong side and piled on top of an American type pick-up. The latter vehicle, a Chevrolet, was on its correct side; its rear end was pushed into a culvert dug into the bank; the driver was trapped behind the steering wheel and appeared to be dead. The lorry was far over on its wrong side and he had no difficulty in driving his Vauxhall saloon between the lorry and its correct side of the road. The Chevrolet had been driven back (by the impact) more than its own length and the front wheels of the lorry had been detached and driven right back to the rear end of the lorry. It was a dusty road but not abnormally so. It was not skiddy. There was a curved piece of road sloping steeply between two bends. There is a steep camber at the top bend on the lorry's near side as it came round the bend.

Superintendent Barratt and Inspector Graham of the Kenya Police visited the scene of the accident on the morning of April 12, took photographs and made a plan which were exhibited. I do not propose to examine their evidence in detail; but it establishes, in my opinion, that a very violent collision had taken place, the Chevrolet being forced backwards about thirty-three feet along the embankment on its left hand side. The impact had been so violent that the front wheels of the lorry had been forced right back and were locked with the rear wheels; a bag of charcoal (which appeared to be part of the load carried by the lorry) was thirty-two feet in front of the place where the lorry had come to rest and there were fragments of broken windscreen and head-lamp glass fifty-four feet in front of that place. If it is correct that the point of impact was thirty-three feet behind the place where the lorry came to rest, this would mean that the charcoal and the glass had been thrown about sixty-five feet and eighty-seven feet respectively. The police witnesses said that it was impossible to say what gear the lorry was in at the time

of the accident. The gear lever

was bent. There was no mark on the road to indicate that a tyre had burst prior to the accident.

The road at that point was nineteen feet two inches wide. The front nearside wing of the lorry was twelve feet ten inches from its nearside of the road. The rear nearside wing was twelve feet from its nearside of the road. A scrape made by the lorry's offside spring which had come adrift, started only twenty inches from the lorry's offside of the road. Inspector Graham was of opinion that this was the point of impact. Learned counsel for the defendants challenged this as impossible, arguing that this would mean that Mr. Hayes' car, which was five feet four inches in width, would be right off the road. But that argument postulates that the off front spring of the lorry struck Mr. Hayes' car on its right wing or thereabouts. There is nothing to show that the lorry did not strike Mr. Hayes' car much further to the car's left than the right wing. There may have been an almost head-on collision. But, if the lorry's offside spring was only twenty inches from its offside of the road, then that is some evidence to support the other evidence that the lorry was well over on its wrong side.

The second defendant has testified that before rounding the bend, he was in second gear; he cannot remember the speed as the speedometer was not working, but he was going at "normal" speed. It was a dangerous corner and he was taking great care. When he rounded the bend he saw a car very near to him; he attempted to steer to his left to avoid it, but the steering wheel went round and did not make the lorry go to the left; there was no negligence on his part; the immediate cause of the accident was the failure of the steering to make the lorry go to the left. The second defendant denies that he was on the wrong side of the road and travelling fast.

On the other hand, Benson Mwangi, a passenger in the front seat of the lorry (who was thrown right through the windscreen when the crash occurred) says that the lorry approached the corner going downhill at between 20 and 40 m.p.h.: it was travelling very fast for a corner like that and was in the middle of the road. The driver tried to turn to the left but was not quick enough. I thought that this witness (called for the defence) was a truthful witness, describing as accurately as he could what took place. He is supported by Mrs. Hayes and the police witnesses, except that their evidence puts the lorry further over to the right of the road. I was not impressed by the second defendant's evidence and I reject it. In coming to this conclusion, I have entirely left out of account the fact that the second defendant pleaded guilty to a charge of manslaughter. He says that his plea was induced by a promise by a police officer of a more lenient punishment if he pleaded guilty. If there was any such promise, that is deplorable. That, I think, has been investigated in other proceedings. In any event, nothing in the criminal proceedings has had the slightest influence upon me in this case. I have reached my conclusion on the evidence of the accident adduced before me in this case. In my opinion, that evidence establishes, beyond any doubt whatever, that the cause of the accident was the negligence of the accused in taking a dangerous left hand bend too fast with a heavy load so that he swung out to his wrong side of the road and, at the speed at which he was travelling, was unable either to stop or to steer to the left so as to avoid the deceased's car which was on its correct side of the road. I do not believe that a lorry tyre burst before the accident as was (somewhat half-heartedly) suggested by the defence. Neither do I believe that the steering broke. The first defendant used to check the mechanical condition of the lorry. He carried out a check fifteen days before the accident when the steering was checked and found to be in order, and there was nothing wrong with it when he drove the lorry four days before the accident. It would, of course, be possible for some defect to develop suddenly, but I do not believe that it did. To my mind, the evidence of the witnesses and the violence of the

impact conclusively establish that the corner was taken at speed with a considerable load and several passengers and this, and the tendency of the lorry to swing outwards on the bend, would account for the fact that the driver was unable to achieve the sudden swerve to the left which he attempted when he saw the deceased's car.

I answer the first issue "Yes".

I now turn to the second issue, damages, and deal first with the assessment of the damages under s. 4 of the Fatal Accidents Ordinance (Cap. 9). That section is based upon s. 2 and s. 3 of the Fatal Accidents Act, 1846, and s. 1 of the Fatal Accidents (Damages) Act, 1908. Decisions of the House of Lords and the Court of Appeal in England on the assessment of damages under those sections to the extent that they are in pari materia should be followed by this court (*Trimble v. Hill* (1), [1879] 5 A.C. 342, 345 (P.C.); *Nadarajan Chettiar v. Walauwa Mahatmee* (2), [1950] A.C. 481, 492), and decisions on those sections of the High Court in England form a most valuable guide. I have perused the following cases: *Davies v. Powell Duffryn Associated Collieries Ltd.* (3), [1942] A.C. 601; *Woodroff v. National Coal Board* (4) (1954), C.A. No. 58 referred to in Kemp and Kemp on the Quantum of Damages Vol. 2 at p. 66; *Zinovieff v. British Transport Commission* (5), referred to in Kemp and Kemp at p. 81 et seq; *Roughhead v. Railway Executive* (6) (1949), 65 T.L.R. (R.) 435; *Grand Trunk Railway Co. of Canada v. Jennings* (7), [1888] 13 A.C. 800 (P.C.); *Nance v. British Columbia Electric Railway Co. Ltd.* (8), [1951] A.C. 601 (P.C.) and from them I deduce that the following is the method of assessment of damages for the death of a husband and father of small children which this court should endeavour to apply. The court should find the age and expectation of working life of the deceased, and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalised by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the remarriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants.

In this case, the age of the deceased was forty-eight. The evidence of his widow (on which she was not cross-examined) is that up to the date of his death his state of health was very good. He was a very active man and had no physical disability or defect. He farmed an estate near Nakuru owned by a limited company, Kedowa Estates, Ltd., in which he was the only substantial shareholder. He and Mrs. Hayes started the farm in 1946. They had to carve it out of the bush. From 1946 to 1952 they struggled to get it going. In 1952 they got a bank loan of £5,000 with which they were able to buy machinery and made more profits. This was his sole source of income for himself and his family. During the years 1953, 1954 and 1955 the salary of Mr. Hayes was respectively £1,500, £3,000 and £2,000 per annum. The profits of the company during those years after paying Mr. Hayes' salary were: for 1953, £550; for 1954, £111; for 1955, £252. These are figures returned for purposes of income tax and they are probably on the low side. I propose to ignore the small profits of the company over and above Mr. Hayes' salary as these, not having been

distributed, should be taken to increase the value of the deceased's estate which the widow and her children inherit. I shall base my calculation on Mr. Hayes' salary, and I think it would be fair to take an average of the years 1953, 1954 and 1955, as these reflect the position following the receipt of the bank loan which enabled enhanced profits to be made. There is no evidence as to how much, if any, of that loan has been repaid, but that is a matter which must have been taken into consideration in arriving at the value of the estate for the purposes of estate duty. It is in evidence that the value of the estate of the deceased amounted to a little over £2,000. This seems low, but may be accounted for by the fact that the farm was incumbered or that there were other debts. In any event, it is the only valuation I have. It was not challenged by the defendants and I must accept it. The average gross annual salary of the deceased for the years 1953 to 1955 inclusive was £2,166. A gross income of £2,000 represents a net income after deduction of tax of £1,763 according to accountant's figures put in evidence. The net figure seems high; but again it was not challenged and I have no means of checking the computation. I think that Mr. Hayes' income from a farm which had been established was much more likely to increase than to decrease, and that if I take a figure of £1,800 per annum as representing his future net annual earnings out of the farm, this is not an overestimate; I think that, in the circumstances of this case, it would be fair to allot this as between Mr. Hayes and his dependants in the proportion of one-third for his expenses and two-thirds for theirs. Mrs. Hayes said she thought the proportion was about three-quarters to a quarter, but she also said she did not really know. There are two daughters, aged ten and seven respectively, and the expenses of their education would be liable to increase for some years to come. Two-thirds of £1,800 per annum is £1,200 per annum. I think that the £60 or so per annum which the deceased used to send to his mother may fairly be debited to his one-third share.

I see no reason to suppose that Mr. Hayes' expectation of earning life would have been less than fifteen years. He was a fit, active man of forty-eight, engaged in a healthy occupation in a temperate climate. It is quite likely that it would be more than fifteen years but I think that, having regard to all the circumstances, the income may fairly be capitalised at fifteen years' purchase.

The value of the estate I take at £2,000 and this must be deducted. This brings me to the difficult question of assessing the probabilities of the widow's re-marriage. Apparently Mrs. Hayes has an offer of marriage from a Government servant, employed in the Veterinary Research Laboratory at Kabete. But there is no engagement. Mrs. Hayes has not made up her mind and, notoriously, proposals do not always result in marriage. How imponderables of this kind can be assessed in pounds, shillings and pence I do not know. I can only say that there is a possibility, even a fairly strong probability of the widow's re-marriage; but it would be very unfair to rate this as a certainty. I propose to make a fairly substantial deduction on this account. It must, however, be borne in mind that even if Mrs. Hayes does re-marry, her second husband will not be under a legal obligation to support the children of her first marriage.

I think that in this case, discount for acceleration of payment to the widow of what the husband left her should be little more than nominal. As in *Roughhead's* case (6), I think that the probabilities are that, had the deceased lived for several years, Mrs. Hayes would have benefited by more than the sum which she will now receive.

Neither do I propose to make a deduction because Mrs. Hayes has now been appointed Managing Director of the Kedowa Estates, Ltd., at a salary of £1,200 a year. This is probably a method of giving her an income essential for her support. I am not sure that this would be a legitimate deduction, any more than it would be a legitimate deduction to take into account the salary of, say, the widow of a professional man who had, since his decease, supported

herself by secretarial work. It may be mentioned that since the deceased's death the company has had to maintain two resident managers who did not have to be employed while Mr. Hayes was alive, and their salaries and the salary paid to Mrs. Hayes will have to come out of the profits and will therefore reduce the money available for dividends and indirectly decrease the value of Mrs. Hayes' shares in the company. Mrs. Hayes and the other dependants are therefore, in effect, paying her salary.

Having considered all the relevant factors, I have come to the conclusion that the amount which I ought to award as damages under the Fatal Accidents Ordinance is £12,000 or Shs. 240,000/-, which I apportion as follows:

- (1) Half to Mrs. Hayes, £6,000 i.e. Shs. 120,000/-.
- (2) One quarter to the daughter Margaret, £3,000 i.e. Shs. 60,000/-.
- (3) One quarter to the daughter Anne, £3,000 i.e. Shs. 60,000/-.

The next question is the quantum of general damages which should be awarded to each of the plaintiffs. I have, earlier in this judgment, mentioned the injuries suffered by each, the time spent by each in hospital and the nature of any injuries likely to be permanent.

I assess the general damages as follows:

- (1) Mrs. Hayes, £500 i.e. Shs. 10,000/–.
- (2) Margaret Hayes, £400 i.e. Shs. 8,000/–.
- (3) Anne Hayes, £750 i.e. Shs. 15,000/–.

Accordingly, the damages awarded to each of the plaintiffs are as follows:

To Mrs. Hayes:

(i) Under the Fatal Accidents Ordinance	Shs. 120,000.00
(ii) General damages	10,000.00
(iii) Special damages (a)	691.50
(b)	1,266.30
	<hr/>
	Shs. 131,957.80

To Margaret Hayes:

(i) Under Fatal Accidents Ordinance	Shs. 60,000.00
(ii) General damages	8,000.00
(iii) Special damages	731.70
	<u>Shs. 68,731.70</u>

To Anne Hayes:

(i) Under the Fatal Accidents Ordinance	Shs. 60,000.00
(ii) General damages	15,000.00
(iii) Special damages	1,260.85
	<u>Shs. 76,260.85</u>

There will, therefore, be judgment against the defendants jointly and against each of them severally:

- (a) in favour of the first plaintiff for Shs. 131,957.80;
- (b) in favour of the second plaintiff for Shs. 68,731.70;
- (c) in favour of the third plaintiff for Shs. 76,260.85

making a total sum of Shs. 276,950.35, together with the costs of this suit to be taxed.

I consider it very desirable that the moneys awarded as damages to the second and third plaintiffs should, when recovered be settled on trust for them and to secure their education and start in life.

Judgment for the plaintiffs. Damages under the Fatal Accidents Ordinance assessed at £12,000, whereof £6,000 apportioned to the first plaintiff and £3,000 each to the second and third plaintiffs. Special and general damages awarded in addition.

For the plaintiffs:

Bryan O'Donovan

For the defendants:

Oliver J Shaw and BRP Todd

For the plaintiffs:

Advocates: *Bryan O'Donovan*, Nairobi

For the defendants:

Oliver J Shaw, Nakuru

The Commissioner of Income tax v GV Lakhani

[1961] 1 EA 136 (SCK)

Division: HM Supreme Court of Kenya at Nairobi

Date of judgment: 24 March 1961

Case Number: 361/1960

Before: Miles J

[1] *Income tax – Assessment – Penalty – Demand tax and 20 per cent. penalty – Notice that if tax paid within specified time penalty reducible to 5 per cent – Tax paid within time – Penalty not paid within time – Action to recover full penalty – East African Income Tax (Management) Act, 1958, s. 102 (4), s. 109, s. 111, s. 118 and s. 120.*

[2] *Income tax – Statutory certificate of tax due from defendant – Whether certificate conclusive as to amount due – East African Income Tax (Management) Act, 1958, s. 124 (2).*

Editor's Summary

On May 21, 1959, a notice of assessment under s. 120 of the East African Income Tax (Management) Act, 1958, was served on the defendant, assessing him to tax in respect of the year of income, 1957. Under s. 118 of the Act this sum became payable on July 21, 1959, and the tax not having been paid, a demand note under s. 120 of the Act was served on the defendant requiring payment of the tax with a

penalty at 20 per cent. The demand note further stated that if the tax was paid within a certain time the penalty would be reduced under s. 120 (3) to 5 per cent., namely Shs. 840/-. The defendant paid the tax but not the penalty at the reduced rate within that time whereupon the plaintiff sued the defendant for the full penalty. At the trial a certificate under s. 124 (2) of the Act was produced to the effect that the “defendant owes the sum of Shs. 3,360/-, being 20 per cent. penalty for the year of income 1957” and it was contended that this certificate could not be contested and was conclusive as to the amount due. For the defendant it was submitted that the only sum due was the reduced penalty.

Held –

- (i) section 120 of the Act does not either expressly or impliedly indicate that if the taxpayer does not pay the reduced penalty under sub-s. 3 the full 20 per cent. penalty automatically becomes payable.
- (ii) a certificate issued under s. 124 (2) of the Act by the Commissioner of Income Tax is not conclusive of the matters stated therein and a defendant is not debarred from raising a proper defence thereto.

Judgment for the plaintiff for Shs. 840/- reduced penalty.

No cases referred to in judgment

Judgment

Miles J: This is a claim by the Commissioner of Income Tax for the sum of Shs. 3,360/- being penalty claimed under s. 120 of the East African Income Tax (Management) Act, 1958.

The claim arises in the following circumstances, which are admitted:

On May 21, 1959, a notice of assessment under s. 102 (4) of the Act was served upon the defendant, assessing him in respect of the year of income, 1957, in the sum of Shs. 16,804/-. Under s. 118 of the Act this sum became payable on July 21, 1959. The tax not having been paid, a demand note under s. 120 of the Act was served on the defendant on August 14, 1959, requiring payment of the said income tax assessed, with a penalty of Shs. 3,360/-, totalling in all Shs. 20,164/-.

There is no dispute as to the amount of tax payable. The demand note was in the following terms:

“In accordance with s. 120 the tax payable is now increased by an amount equal to 20 per cent., and I have therefore to demand payment of:

Income Tax assessed	Shs. 16,804/-
20 per cent. addition	3,360/-
Total	Shs. 20,164/-

and to inform you that if the total sum is not paid to me within forty-four days from the date of service of this demand note, steps will be taken to enforce payment in accordance with the law.

“If, however, you make payment of the tax to this office not later than 11 a.m. on September 4, 1959, I shall be prepared to exercise the powers conferred upon me by sub-s. (3) of s. 120 and to reduce the penalty to 5 per cent. of the tax charged, as follows:

Assessed	Shs. 16,804/-
Penalty reduced to 5 per cent	840/-
Total.	Shs 17,644/-”

The defendant did not pay the tax direct to the Commissioner’s office on the day in question, but he did on that day make a payment into the Nairobi branch of the National and Grindlays bank, to the credit of the East African Income Tax Department of the sum of Shs. 16,804/-. It is conceded for the purpose of this case that this was a compliance with the demand note so far as the payment of tax was concerned.

The defendant did not, however, pay the sum of Shs. 840/- reduced penalty and on September 15 he wrote to the Commissioner of Income Tax:

“As you are aware money is becoming very difficult these days so please be kind enough to weave (sic) the penal charges on the assessment and oblige.”

In reply the Collector of Income Tax wrote on September 23, 1959.

“I am not prepared to cancel the late payment penalty in full but will reduce it from 20 per cent. to 5 per cent. if you will let me have your remittance for Shs. 840/- by return.”

The defendant did not pay the amount in question and, on November 13, 1959, the collector wrote to the defendant:

“Unless your remittance for Shs. 840/- is now received by November 25, 1959, the full penalty of Shs. 3,360/- will stand and proceedings taken against you for recovery in accordance with the law.”

The defendant again failed to make the payment and proceedings have been commenced for the full penalty of Shs. 3,360/-.

In his defence the defendant contends that the only sum now due is the sum of Shs. 840/- reduced penalty. On behalf of the plaintiff it is contended that the defendant, having failed to pay the sum of Shs. 840/- either on September 4, 1959, or on any other date, the whole amount of the penalty becomes due. Section 120 is in the following terms:

“120. (1) Subject to sub-s. (3), if any tax is not paid on the due date—

- (a) a sum equal to 20 per cent. of the amount of the tax payable shall be added thereto as a penalty; and
- (b) the Commissioner shall cause a demand note to be served, either personally or by registered post, on the person assessed;

and if payment of the tax and penalty is not made within thirty days from the date of service of such demand note, then such tax and penalty may be recovered in accordance with this Act.

“(2) A penalty imposed under this section shall not be regarded as tax for the purposes of this Act:

“Provided that the provisions of this Act relating to the collection and recovery of tax shall apply to the collection and recovery of such penalty as if it were tax.

“(3) The Commissioner may, in his discretion, remit the whole or any part of the penalty due under this section.”

In my opinion the contention of the plaintiff is ill-founded. In the first place there is nothing in s. 120, either expressly or impliedly, to indicate that if the taxpayer does not pay the reduced amount of the penalty under sub-s. 3 the full 20 per cent. automatically becomes payable. Secondly, the demand note throughout makes a clear distinction between the tax and the penalty. All that the defendant was required to do under this notice was to pay “the tax” to the plaintiff’s office within the time specified. If he required the defendant to pay the tax and the reduced penalty within this period it was open to him to make his requirement clear, but he has not done so. It is said on behalf of the plaintiff that the defendant has not kept his part of the bargain, but there is nothing in the nature of a legal contract obliging the defendant to pay the reduced penalty within any particular period and the correspondence subsequent to the notice of demand had no legal effect whatsoever. This being a matter of penalty the demand note must be strictly construed as meaning what it says, namely that the tax was to be payable within the time mentioned.

At the trial a certificate under s. 124 (2) was produced to the effect that the

“defendant owes the sum of Shs. 3,360/-, being 20 per cent. penalty for the year of income, 1957”.

Section 124 (2) provides:

“In any suit under sub-s. (1) the production of a certificate signed by the Commissioner giving the name and address of the defendant and the amount of tax due by him shall be sufficient evidence that such amount

of tax is due by such person and sufficient authority for the court to give judgment for such amount.”

It is contended on behalf of the plaintiff that this certificate cannot be contested and is conclusive as to the amount due. This involves consideration of two questions; first whether the certificate is conclusive and, secondly, if so, as to what matters is it conclusive? Does the expression “tax due” mean tax only or does it include any penalty that may be due? As to the first question I am of opinion that all the sub-section does is to facilitate the proof of the amount due by dispensing with the necessity for the attendance of a witness in every case that may arise. The words “sufficient authority for the court to give judgment for such amount” have probably been used instead of saying that the court “may give judgment” to avoid the possibility of doubt arising as to whether the word “may” is mandatory or permissive. There is nothing in the section which warrants the inference that a certificate is in any way conclusive or that a defendant is debarred from raising a proper defence. I would make it clear that in saying this I do not mean that it is open to taxpayer to raise any conceivable defence which he chooses. A taxpayer, for example, who has failed to avail himself of his right of objection to the assessment under s. 109 or his right of appeal under s. 111 cannot be heard at the trial to say that an assessment is erroneous, but this position would arise irrespective of the provisions of s. 124 (2) of the Act. I hold, therefore, that a certificate under s. 124 (2) is not conclusive of the matters therein stated. In view of this it is unnecessary to consider the second question mentioned above.

For these reasons I hold that the claim of the plaintiff is not sustainable. There will be judgment for the plaintiff for the sum of Shs. 840/- which sum the defendant has paid into court. I will hear argument as to costs.

Judgment for the plaintiff for Shs. 840/- reduced penalty.

For the plaintiff:

BAK Le Champion (Senior Asst. Legal Secretary, E.A. High Commission)

For the defendant:

Swaraj Singh

For the plaintiff:

Advocates: *The Legal Secretary*, E.A. High Commission

For the defendant:

Swaraj Singh, Nairobi

Jaffers Limited v Caltex (Africa) Limited
[1961] 1 EA 140 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	13 March 1961
Case Number:	80/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA

Appeal from: H.M. High Court of Tanganyika–Law, J

[1] *Jurisdiction – District court – Landlord and tenant – Lease – Forfeiture – Action for forfeiture – Value of premises for purposes of jurisdiction – Principles for valuing premises – Subordinate Courts Ordinance (Cap. 3), s. 4 (4) (T.) – Court Fees Rules, Item 13 (T.) – Indian Court Fees Act, 1870, s. 7 (XI) (cc) – Indian Suits Valuation Act, 1887, s. 8 – Rent (War Restriction) Ordinance, 1918 (K.).*

Editor’s Summary

The plaintiff agreed to lease certain premises to the defendant for a term of eighteen months and thereafter from month to month. One of the conditions of the tenancy was that the defendant was required to dispose of certain specified quantities of motor spirit and petroleum products through the premises during the first year of the term. The plaintiff alleged that the defendant had not complied with this condition and gave notice of forfeiture. The plaintiff then sued in the Moshi district court for possession and mesne profits and averred in the plaint that the value of the possession and mesne profits was less than Shs. 15,000/- which would confer upon the district court jurisdiction under the Subordinate Courts Ordinance. The magistrate upheld a preliminary objection that the value exceeded Shs. 15,000/- and rejected the plaint. On a first appeal the High Court held that the basis of valuation for the purpose of jurisdiction was the equivalent of twelve months rent which he held to be Shs. 11,700/- and he also held that neither the claim for mesne profits nor for damages brought the value of the suit to a sum in excess of Shs. 15,000/-. On further appeal

Held –

- (i) the value to be considered is the value of that which the plaintiff seeks to recover and not that which the tenant may lose.
- (ii) the plaintiff sought to recover possession of his premises in perpetuity and since the rental value of the premises was Shs. 975/- per month, the valuation of the property must amount to more than Shs. 15,000/-.

Appeal allowed. Judgment and decree of the High Court set aside. Decision of the magistrate restored.

Cases referred to:

- (1) *Lewis Fernandes v. Joseph & Son* (1919), 8 E.A.L.R. 99.
- (2) *Kuwathkhan v. Ahmed Adam*, Tanganyika High Court Civil Appeal No. 1 of 1949 (unreported).
- (3) *Gangabhai Harji v. Bhoja Keshar* (1957), 2 T.L.R. (R.) 238.
- (4) *Ahmed Bin Salim Sufra v. Abdulla Bin Omar Bin Hassan Sufra*, Zanzibar High Court Civil Appeal No. 15 of 1946 (unreported).
- (5) *Ram Chand v. Ram Dass* (1910), 5 I.C. 510; Desai’s All India Century Civil Digest, 1811–1912, Vol. XL. p. 424.
- (6) *Mohamed bin Seif el-Miskiri v. The Waqf Commissioners*, Zanzibar High Court Civil Appeal No. 10 of 1945 (unreported).

March 13. The following judgments were read:

Judgment

Gould JA: The appellant company (hereinafter called “the defendant”) was the defendant in a suit brought by the respondent company (hereinafter called “the plaintiff”) before the resident magistrate in the district court at Moshi. The plaintiff alleged that the plaintiff had agreed to lease certain premises to the defendant (by its trustee) for a term of eighteen months from June 1, 1958 (and thereafter from month to month), and that the defendant had failed to comply with a condition requiring it to pass through the premises certain specified quantities of motor spirit and other petroleum products during the first year of the tenancy; notice of forfeiture had therefore been given. The rent was Shs. 975/- per month and it was common ground that there was no question of any statutory tenancy. The plaintiff was issued on October 1, 1959. The concluding paragraphs and the prayer of the plaintiff were as follows:

“11. The cause of action arose in the Moshi district during the year 1958–59, the suit premises and the registered office of the defendant are situated in the Moshi township, and the value of the possession and mesne profits are valued at less than Shs. 15,000/- and this honourable court has jurisdiction to try this case.

“12. By reason of the matters aforesaid the plaintiff has suffered damage.

“Wherefore the plaintiff claims:

- (1) Possession of the said premises;
- (2) Mesne profits;
- (3) In the alternative damages for breach of condition;
- (4) Costs.”

The resident magistrate rejected this plaintiff and the plaintiff appealed to the High Court of Tanganyika, where LAW, J., in his judgment summarised the proceedings before the resident magistrate as follows:

“By the Schedule to the Subordinate Courts Ordinance (Cap. 3) the civil jurisdiction of a district court, when presided over by a resident magistrate, extends to suits in which the subject matter in dispute does not exceed Shs. 15,000/-. At the hearing of the suit a preliminary objection was taken on behalf of the defendant company (now the respondent) that the appellant’s valuation should not be accepted and that the district court had no jurisdiction to try the suit. By paras. 10 and 12 of the written statement of defence, the respondent had pleaded as follows:

‘10. The facts showing that the court has jurisdiction have not been properly pleaded and that they are vague, uncertain and insufficient to determine the pecuniary jurisdiction of the court.

‘12. As the plaintiff has failed to state in the plaintiff the particulars of the mesne profits and damages as required by law the prayers for mesne profits and damages should be struck out.’

“A number of authorities and the relevant provisions of the law were quoted to the learned resident magistrate, who in a carefully reasoned ruling held as follows, with reference to the value of the subject matter of the suit:

‘I find that this court has no jurisdiction upon whatever test is applied, be it capital value, be it possession value, or be it as I think it must be in this case, possession value plus the value of the contractual rights of the parties.’

“He accordingly rejected the plaint and directed that the suit be presented to the High Court.”

Law J allowed the appeal against the decision of the resident magistrate. As regards the claim for the return of the premises, he held that the appropriate basis of valuation for the purpose of jurisdiction was the equivalent of twelve months’ rent of the premises; he based this finding in part on the fact that item 13 of the Court Fees Rules (Vol. V, Laws of Tanganyika, p. 158) provides that the fee payable in respect of a suit by a landlord against a tenant for recovery of possession is 5 per cent. on the yearly rental of the property. Law, J., therefore considered that the valuation of the suit for the purposes of the claim to possession should have been Shs. 11,700/- and in his view neither the claim for mesne profits nor the alternative claim for damages brought the total value of the suit to an amount in excess of Shs. 15,000/-. The present appeal has been brought against the decision of Law, J.

The provisions regulating the jurisdiction of district courts are contained in the Subordinate Courts Ordinance (Cap. 3 of the Revised Laws of Tanganyika) and for the purposes of this case it is necessary only to set out the relevant portions of s. 4 (4) and of the Schedule. Section 4 (4) excluding the proviso, which is not relevant, reads:

“(4) The High Court may, by general or special order, fix the limits of the jurisdiction of a district court when presided over by a magistrate of the first, second or third class respectively in suits and proceedings of a civil nature; and, subject to any such order, the said jurisdiction shall be limited as specified in the Schedule hereto.”

The Schedule provides:

“In suits and proceedings of a civil nature, in which the subject matter in dispute is capable of being estimated at a money value, the ordinary jurisdiction of the district courts specified in the first column hereunder shall be limited to suits and proceedings in which the subject matter does not exceed the amount or value specified respectively in the second column hereunder:

<i>First Column</i>	<i>Second Column</i>
A district court, when presided over by a resident magistrate.	Fifteen thousand shillings.”

The main matter to be decided in this appeal is the correct basis of valuation of the subject matter of a suit in which a landlord claims to recover possession of premises from a tenant following upon a purported forfeiture of his lease. At first sight it may appear that the subject matter of such a suit is whatever is put in issue by the parties, but the difficulty of such a construction is that the suit must be valued for the purposes of jurisdiction in the plaint, at which stage nothing has been put in issue. The landlord may consider that he knows the extent to which the tenant will seek to resist his claim, but he cannot actually have that knowledge until a defence is filed; meanwhile he must show in his plaint that the court has jurisdiction. In this respect there is a difference between such a valuation and the valuation of the subject matter of an appeal, which takes place after issues have been settled, fought and decided. For this reason, and because the wording of the rules in question differs substantially from the wording which is relevant in this case, a number of cases cited by counsel relating to the right of appeal from this court to the Privy Council are of no assistance.

The question has been considered in a number of cases in East Africa, but the only decision of this court to which reference has been made as being directly in point is that in *Lewis Fernandes v. Joseph & Son* (1) (1919), 8 E.A.L.R.

99. That was a suit for ejectment in which the tenant claimed the right to remain in possession by virtue of the Rent (War Restriction) Ordinance No. 1 of 1918. The Kenya court concerned had jurisdiction:

“over all persons in all matters in which the value of the subject in dispute does not exceed seven hundred and fifty rupees.”

The magistrate and the Supreme Court on appeal considered that the value of “the tenant right” should be accepted as the criterion. This court did not agree and said, at p. 101:

“We feel that the introduction of the mention of the tenant right into the case in the first instance was both erroneous and misleading. Its value in our opinion can never be considered a test of jurisdiction in an action for ejectment brought by a landlord although it may be conceivably such a test in the converse case where a tenant is seeking relief. The value which should be taken into consideration in the present case is in our opinion the value of that which the plaintiff is seeking to recover and not what the tenant may lose. In this case the plaintiff sought to recover possession of his house presumably in perpetuity and the value of such possession of the house in question clearly exceeds Rs. 750 the pecuniary limit of the jurisdiction of a resident magistrate. The words ‘the value of the subject in dispute’ appearing in s. 19 of the Courts Ordinance, 1907, may have led to the misconception to which we have alluded and we would observe that the meaning to be attached to those words in our opinion is that the value of the unsatisfied claim as stated in the plaint is to be considered.”

That, as I see it, is a decision by this court of the very point in issue in the present case, and unless it is to be distinguished, it must be considered as binding; no higher judicial authority directly in point was referred to in argument. I would say, firstly, that in my opinion there is no valid distinction to be drawn from the circumstance that the defence was that the premises were said to be subject to legislative control. The value of what the tenant might lose was expressly rejected as a basis of valuation (in an action by a landlord) and it follows that it is immaterial whether the tenant relies upon a statutory tenancy, an unexpired term, an invalid forfeiture or any other defence. The use of the phrase “presumably in perpetuity” has, I think, no significance except to indicate that the position might be different if the landlord himself could only assert a temporary or limited right to possession. It is to be noted that in a claim for recovery of premises where a tenant is wrongfully holding over, there is no “tenant right” to which a value can be assigned.

In *Kuwathkhan v. Ahmed Adam* (2), Tanganyika High Court Civil Appeal No. 1 of 1949—(unreported) Paul, C.J., sought to distinguish the decision in *Lewis Fernandes v. Joseph & Son* (1), from the case before him, on the ground that the wording of the Kenya provision as to jurisdiction (quoted above) differed from that in Tanganyika. He said:

“The Appeal Court held that in the suit instituted for recovery of possession of a house the value of ‘the subject in dispute’ was the value of the house and not the value of a tenant right.

“The section in *Fernandes*’ case was however in an important respect different from the section now before me as the court in *Fernandes*’ case was given ‘Full jurisdiction over all persons *in all matters*’ where the ‘subject in dispute does not exceed 750 rupees’. That is to say in the section construed in *Fernandes*’ case it was the value of the ‘subject in dispute’ and not of the ‘matters’ in dispute which determined jurisdiction. Here it is the ‘subject *matter* in dispute’ which has to be valued. The house in the present case may be said to be the *subject* in dispute in this suit but it is

certainly not the subject *matter* in dispute in this suit. This case is in my view distinguishable from *Fernandes*' case.

"I would therefore hold that the 'subject matter in dispute' in this suit was as the pleadings clearly show restricted at most to a year's occupation of the house the subject of the dispute, and that such subject matter was certainly under Shs. 4,000/- in value."

I have considered with care the distinction sought to be drawn in that passage, which was not in fact essential to the decision of the learned judge, and, with great respect, I am unable to agree that it is a valid one. If there is a difference between the "subject" in dispute and the "subject matter" in dispute, I should have thought that the additional word in the latter phrase brought the concept closer to the material thing—the chattel or the house—than does the word "subject" alone. But, in the context, I think the expressions are indistinguishable in meaning. All actions are brought to enforce rights of some sort (except perhaps those for declarations of rights) in this case a right to possession, and I think the point is rightly taken in *Lewis Fernandes v. Joseph & Son* (1) that it is the value of the unsatisfied claim as stated in the plaint, which must be considered. In *Gangabhai Harji v. Bhoja Keshar* (3) (1957), 2 T.L.R. (R.) 238 at 242 Biron, Ag. J., referred to the distinction drawn by Paul, C.J., but his decision proceeded upon other grounds. In a Zanzibar case, *Ahmed Bin Salim Sufra v. Abdulla Bin Omar Bin Hassan Sufra* (4), (Zanzibar High Court Civil Appeal No. 15 of 1946—(unreported)) Gray, C.J., did not think it necessary to make any such distinction, though the wording of the Zanzibar provision is similar to that of Tanganyika. He said:

"Since delivery of that judgment I have been fortified in the opinion there expressed by having my attention called to *Lewis Fernandes v. Joseph & Son* (1919), 8 E.A.L.R. 99, in which the East African Court of Appeal held that where a suit is instituted for the recovery of possession of a house the value of 'the subject in dispute' is the value of the house. In our local law the relevant words are to be found in s. 14 (4) (b) of the Courts Decree, 1923, and para. 9 (3) (b) of the British Subordinate Courts Order, 1923, which limit the jurisdiction of a Kadhi's court 'to suits and proceedings of a civil nature in which the subject matter can be estimated at a money value and does not exceed five hundred rupees (Shs. 750/-)'. In my opinion the very slight difference in phraseology between the Zanzibar law and the relevant law in Kenya makes no difference in the present case. Here the house, in respect of which possession was claimed in the Kadhi's court, was not valued for the purposes of the suit and consequently there is nothing to show that the Kadhi had jurisdiction."

That case was not, however, one of landlord and tenant. In the present case the resident magistrate said that he would have preferred to have followed *Lewis Fernandes v. Joseph & Son* (1), but apparently felt bound to follow the decisions of Paul, C.J., and Biron, Ag. J., above referred to, while in the Supreme Court, Law, J., accepted the distinction drawn by Paul, C.J., without discussion, possibly also feeling that he was bound to do so. As I have said, it is my view that there was no valid distinction and *Lewis Fernandes v. Joseph & Son* (1), is a binding authority.

The view of Law, J., that a valuation of twelve months' rent should be adopted in all cases, appears, so far as I can ascertain, to be unsupported by authority, convenient though such a method might be. He referred to the Indian practice, but that is one which has been laid down by legislative enactment. By virtue of s. 7 (xi) (cc) of the Court-fees Act, 1870 (which was inserted by the Court-fees (Amendment) Act, 1905) in a suit by a landlord for the recovery

of immovable property from a tenant (including a tenant holding over) the court fee is to be computed:

“according to the amount of the rent . . . payable for the year next before the date of presenting the plaint.”

Section 8 of the Suits Valuation Act, 1887, provides that in suits in which court fees are payable ad valorem under the Court-fees Act, 1870 (with certain exceptions):

“the value as determinable for the computation of court-fees and the value for the purposes of jurisdiction shall be the same.”

The decision in the case referred to by Law, J., in his judgment, *Ram Chand v. Ram Dass* (5) (1910), 5 I.C. 510, which is only available in Dar-es-Salaam in digest form (Desai’s All India Century Civil Digest, 1811–1912, Vol. XL, p. 424) appears merely to embody the statute law which I have set out. It was not claimed that there is any equivalent legislation in Tanganyika, and in its absence, there appears to be no valid reason for saying that because an arbitrary value is placed by Rules of Court upon certain suits for the purposes of payment of court fees, that value should replace the real value which ought to determine the jurisdiction of a court. Gray, C.J., came to the same conclusion in *Mohamed bin Self el-Miskiri v. The Waqf Commissioners* (6) (Zanzibar High Court Civil Appeal No. 10 of 1945–unreported). It may be said that the method of valuation laid down in *Lewis Fernandes v. Joseph & Son* (1), is also arbitrary; so it is, in so far as it fixes a certain method of valuation, but it has, I think, a basis of logic which is entirely lacking in the twelve months’ rent method. If it is considered that the last-mentioned method should be adopted for the sake of convenience, that end in my opinion must be attained by legislation.

In my opinion therefore the correct valuation of this suit, so far as it embodied a claim for the return of the suit premises, was one to be arrived at in accordance with the principle in *Lewis Fernandes v. Joseph & Son* (1). There is no suggestion that the right or claim to possession of the plaintiff is in any way limited, and it is not disputed that such a valuation of a property, the rental value of which is Shs. 975/- per month, would amount to more than Shs. 15,000/- the limit of the jurisdiction of the resident magistrate. That being so, it is unnecessary for me to consider the arguments addressed to the court on the subject of mesne profits and damages, or the other grounds of appeal.

I would allow the appeal, set aside the judgment and decree in the High Court, and restore the decision of the resident magistrate. The correct form of order would appear to be that the plaint be returned for presentation in proper form to the proper court (which will in this case be the High Court) and I would so order. The defendant should have the costs of both appeals and his costs in the district court.

Sir Kenneth O’Connor P: I agree. There will be orders in the terms proposed by the learned Justice of Appeal.

Sir Alastair Forbes V-P: I also agree.

Appeal allowed. Judgment and decree of the High Court set aside. Decision of the magistrate restored.

For the appellant:

A Reid

For the respondent:

GN Pillai

For the appellant:

Advocates: *Reid & Edmonds*, Moshi

For the respondent:

Al Noor Kassum & Co, Dar-es-Salaam

IDI s/o Waziri v R
[1961] 1 EA 146 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam

Date of Judgment: 3 January 1961

Case Number: 142/1960

Before: Mosdell J

[1] Criminal law – Receiving stolen property – No conclusive proof of theft or ownership of the goods – No direct evidence of possession of stolen goods – Whether surrounding circumstances sufficient proof of receiving – Penal Code, s. 311 (1) (T.).

Editor's Summary

The appellant was convicted of receiving stolen property namely, four bags of coffee, but there was no direct evidence to prove conclusively the theft or the ownership of the stolen goods. The appellant had offered to sell the bags of coffee to a police inspector at well below the market price and showed the inspector the way to a maize field where the goods were hidden. The appellant then saw a police party and ran away but the goods were later found among the maize. This place was a short distance from the appellant's shop but there was no evidence how the goods were received by the appellant and the point in issue on appeal was whether the circumstances in which the appellant was in possession of the stolen goods were sufficient to prove that the goods were stolen and that the appellant knew or had reason to believe the goods were stolen.

Held –

- (i) the resident magistrate was right in finding that the circumstances in which the appellant was found in possession of the goods, and the circumstances in which he attempted clandestinely to sell them and his subsequent denials of knowledge or possession pointed irresistibly to the receipt of the goods by the appellant knowing them to have been stolen.
- (ii) the circumstances of possession may be sufficient to prove that the property was stolen and that the possessor knew that the property was stolen and knew it when he received it.

Appeal dismissed.

Cases referred to:

- (1) *R. v. Sbarra*, 13 Cr. App. R. 118.
- (2) *R. v. Fuschillo*, 27 Cr. App. R. 193; [1940] 2 All E.R. 489.
- (3) *Cohen and another v. March* (1951), 2 T.L.R. (R.) 402.
- (4) *R. v. Mills*, November 11, 1946 (unreported).
- (5) *Hobson v. Impett*, 41 Cr. App. R. 138.
- (6) *Brannan v. Peek*, [1948] 1 K.B. 68; [1947] 2 All E.R. 572.
- (7) *Wanjiko w/o Mukiri v. R.* (1954), 21 E.A.C.A. 386.

Judgment

Mosdell J: On September 22, 1960, the appellant was convicted in the district court of Arusha at Arusha of receiving stolen property, contrary to s. 311 of the Penal Code. It appears that, in fact, the conviction was for an offence contrary to s. 311 (1) of the Penal Code. It was quite clear from the particulars of the offence alleged, however, that the allegation fell under s. 311 (1) of the Penal Code and no prejudice has been occasioned to the appellant by the omission of (1) after s. 311 in the statement of offence.

I have no reason for disagreeing with the learned resident magistrate's finding as to the following facts:

- (i) that the appellant arranged to sell Sub-Inspector Mir four bags of coffee at Shs. 150/- per bag;
- (ii) that he got on to Sub-Inspector Mir's vehicle and stopped it in the vicinity of the four bags of coffee, the place where the bags were, being some 250 to 300 yards from the appellant's shop;
- (iii) that the appellant ran away before reaching the four bags of coffee, being frightened by the premature appearance of the police party;
- (iv) that a short time afterwards the appellant having been reassured by Sub-Inspector Mir about the appearance of the police earlier, refused to show Sub-Inspector Mir where the bags of coffee were hidden, but instructed another unknown person to lead Sub-Inspector Mir to the place;
- (v) that this unknown person led Sub-Inspector Mir to the spot where the four bags of coffee were hidden, but on seeing the police hiding, took to his heels and fled and has not been traced;
- (vi) that the appellant changed his clothes between the time of the first visit to him on the evening of August 16, 1960, of Sub-Inspector Mir and the time of the last visit to him of Sub-Inspector Mir and Assistant Superintendent Varma later the same evening after the unknown man had run off.

The charge was laid as a result of investigations made by a police party under Assistant Superintendent Varma on the evening of August 16, 1960. As the learned resident magistrate rightly pointed out in his judgment, on this charge of receiving, contrary to s. 311 (1) of the Penal Code, three essentials had to be proved in order to ground a conviction, viz.:

- (i) a theft of the property;
- (ii) possession of the stolen property by the accused;
- (iii) that when the accused received the property he knew or had reason to believe that it had been feloniously obtained.

In the instant case the evidence regarding the theft of the coffee was not conclusive. The circumstances were such that suspicion was aroused that the coffee had been stolen from the "Selian Estate". Mr. Van Rovert, the manager of the Selian Estate, was honest enough to admit that he could not definitely depose that the coffee which was found 250 or 300 yards from the appellant's shop came from the Selian Estate, in spite of the fact that three of the four bags in which the coffee in question was found were clearly marked "Selian Estate". Moreover Mr. Van Rovert deposed that the shape, colour and size of the coffee led him to believe that it had been hulled on his estate, and that the Selian Estate was the only estate in the area that he knew of, which produced that kind of coffee from a special shape of bean of a particular kind of Arabica not to be found growing in such large quantities on neighbouring estates.

However the learned resident magistrate was not satisfied that it had been proved that the coffee had been stolen from the Selian Estate. As a result, the first necessary ingredient in the charge had not been directly proved. But this was not an end to the matter. There was the case of *R. v. Sbarra* (1), 13 Cr. App. R. 118 followed in *R. v. Fuschillo* (2), 27 Cr. App. R. 193. These two cases laid down the principle that where there is a charge of receiving there need not be direct evidence that the goods were stolen goods. This principle was adverted to in *Cohen and Another v. March* (3) (1951), 2 T.L.R. (R.) 402. In the latter case *Cohen and Another* (3), were found to be in possession of

thirty-one thousand Blue Gillette razor blades, and were charged with having received them, being the property of some person or persons unknown, knowing the same to have been stolen. There was suspicion that the razor blades had been stolen, but no evidence that they had beyond the fact that the defendants were found to have given an untrue account as to when the goods came into their possession. Lord Goddard, C.J., said:

“In my opinion no new point arises in this case. The law on the matter is well settled. Whether the charge is one of larceny or of receiving it is clear that there need not be direct evidence that the goods were stolen goods. That arises more generally in the case of receiving, but the law laid down in *R. v. Sbarra* (1), was affirmed in *R. v. Fuschillo* (2), and again affirmed in *R. v. Mills* (4) (unreported). The court has been given a copy of the decision in *R. v. Mills* (4), which was decided on November 11, 1946, and to which my brother Oliver and I were parties. It is there stated: ‘the circumstances under which the defendant receives goods may of themselves prove that the goods were stolen, and further may prove that he knew it at the time he received them’.”

The appeal against conviction succeeded.

In *R. v. Fuschillo* (2), the appellant was the manager of a small shop in Bermondsey, which was owned by his mother. In the scullery and side passage leading from the scullery to the side door police officers found 26 cwt. of sugar in sacks which they believed to be stolen. The appellant on entering the shop said: “I am a bloody fool. Don’t bring the old lady into this” and later after being cautioned “I don’t know why I took it in. I am a bloody fool. This means going away” and “Be satisfied and take it, but don’t take me”. Apart from the appellant’s own statement there was no evidence of the ownership of the sugar, or of the fact that it had been stolen. It was held that the evidence of larceny was sufficient and that the conviction should be affirmed.

In the instant case there is no evidence as to how the coffee was:

“received by the appellant, but proof that the goods in question were found in the appellant’s possession would be good presumptive evidence of the fact of receipt by him”,

vide Archbold Criminal Pleading Evidence and Practice (34th Edn.), para. 2092. Was the appellant in possession of this coffee in the instant case? The learned resident magistrate found that he was, as he believed the prosecution evidence. This in my view was a correct finding. Though the coffee was found some distance from the appellant’s shop the appellant was in control of the coffee the learned resident magistrate found on the facts. Control is the essential element in possession, vide *Hobson v. Impett* (5), 41 Cr. App. R. 138.

What were the circumstances of the appellant’s possession in the instant case? The coffee was hidden in a maize field. It was not in the appellant’s shop. One asks why? Because the appellant had committed a minor offence in respect thereof or because he knew that the coffee had been stolen? A cogent and weighty factor which points to the conclusion that the latter was the case is the fact that the appellant attempted to sell the coffee worth Shs. 1,000/- to Sub-Inspector Mir for Shs. 600/-. The presence of the coffee in the maize field rather than in the appellant’s shop could, if taken by itself, be explained perhaps by the fact that he was contravening s. 13 of the Coffee Industry Ordinance (Cap. 391) in attempting to sell coffee when he was not licensed to transact business in coffee, or some other law, but the abortive sale at the low price of Shs. 600/- coupled with the other factors, namely the clandestine nature of the transaction and the details of the appellant in the face of the credited prosecution evidence would seem to indicate that the appellant’s offence was

the more serious one of having received the coffee knowing it to have been stolen.

Evidence that property is bought at a price very much below the market price is sometimes an indication of guilty knowledge in the buyer. The fact of a sale of property by a person at a price very much lower than the market price sometimes similarly tends to indicate inferentially that the latter person himself had acquired it illicitly and had guilty knowledge. The change of clothing carried out by the appellant moreover, which taken by itself is capable of having an innocent explanation, when coupled with the other facts, as found by the learned resident magistrate, also tends to show that the appellant had guilty knowledge.

The appellant offered no explanation regarding the coffee. He denied that he possessed it or had taken any part in any transaction for its sale. In my opinion the learned resident magistrate came to the right conclusion in finding that the circumstances in which the appellant was found in possession of the coffee, and the circumstances in which he attempted clandestinely to sell it and his subsequent denial of knowledge, or possession, of it irresistibly pointed to the fact that the appellant received the coffee knowing it to have been stolen. The facts as found by the learned resident magistrate in my opinion warranted no other conclusion. I don't wish it to be thought that this decision is in any way an extension of the principle laid down in *R. v. Sbarra* (1), and followed in *R. v. Fuschillo* (2). All I have decided in this appeal, as was decided in *R. v. Fuschillo* (2), is that the circumstances of the possession may be sufficient to prove that the property was stolen and that the possessor knew that fact when he received it. On the facts in the instant case I have upheld the finding of the learned resident magistrate that they were.

I agree with the learned resident magistrate that he need have no qualms over the legitimacy of the police actions in the instant case. The appellant was not trapped into committing an offence by a police officer himself committing an offence as was the case in *Brannan v. Peek* (6), [1948] 1 K.B. 68. On the facts it seems clear that the offence of which the appellant was convicted had already been committed by him before August 16, 1960. Moreover the actions of the police in the instant case undoubtedly fell within the bounds of legitimacy as expounded in *Wanjiko w/o Mukiri v. R.* (7) (1954), 21 E.A.C.A. 386.

There is one other matter raised by the appellant in his grounds of appeal and that is his allegation that he was not allowed to call a second witness in his defence. There is nothing on the record to show that this was the case or that the appellant informed the court that he wished to call another witness. There is this endorsement on the record at the close of the prosecution case—"Accused elects to make affirmed statement, witnesses". The appellant then gave evidence as did one Matunda s/o Terazza on the appellant's behalf. At the end of the latter's evidence there appears on the record "Judgment on September 22, 1960, accused r.i.c." One would have supposed that had the appellant desired to call another witness he would have so informed the court then. He does not appear to have done so. I don't believe the appellant was "not allowed" to call a second witness in his defence.

The appellant has a previous conviction in 1957 for receiving. Thefts of coffee were prevalent at the time of the instant case. In the circumstances I don't consider two years' imprisonment excessive. The appeal is dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

WR Wickham (Crown Counsel, Tanganyika)

For the respondent:

The Attorney-General, Tanganyika

Lombank (Uganda) Ltd v VC Patel and another
[1961] 1 EA 150 (HCU)

Division: HM High Court of Uganda at Kampala
Date of judgment: 3 February 1961
Case Number: 513/1960
Before: Sheridan J

[1] Hire-purchase – Motor vehicle – Default – Action by owners for instalments – Defence that owners were unlicensed money-lenders – Whether transaction genuine hire-purchase – Money-lenders’ Ordinance, 1951, s. 2 (1), s. 11 (3), s. 22 (U.) – Money-lenders’ Act, 1900, s. 2 (1) (a).

Editor’s Summary

The plaintiffs sued the defendants as hirer and guarantor respectively under a hire-purchase agreement for second-hand car. The plaintiffs acquired the car, took a deposit for part of the price from the first defendant and agreed that the balance should be paid under an agreement performance of which the second defendant guaranteed. The main defence was that the transaction was a chattels transfer under s. 2 of the Money-lenders’ Ordinance, 1951, and that as the interest payable exceeded 9 per cent. per annum it was a money-lending transaction and that the plaintiffs were not licensed as such.

Held – The sale of the vehicle to the plaintiffs, a finance company, was a genuine sale; the vehicle was then hired to the first defendant and the agreement was a hire-purchase transaction and not a chattels transfer.

Judgment for the plaintiffs.

Cases referred to:

- (1) *Mercantile Union Guarantee Corporation Ltd. v. Wheatley*, [1937] 4 All E.R. 713.
- (2) *Old Discount Co. Ltd. v. Playfair Ltd.*, [1938] 3 All E.R. 275.
- (3) *Transport and General Credit Corporation Ltd. v. Morgan*, [1939] 2 All E.R. 17.
- (4) *Drury v. Buckland Ltd.*, [1941] 1 All E.R. 269.
- (5) *Polsky v. S. and A. Services*, [1951] 1 All E.R. 185.
- (6) *Premchand Raichand Ltd. v. A. D. Prinja and Another*, Kenya Supreme Court (Mombasa), Civil Case No. 32 of 1960 (unreported).

Judgment

Sheridan J: Subject to the main defence that this debt is unenforceable on the grounds that the plaintiffs are unlicensed money-lenders, the plaintiffs are entitled to succeed to the full extent of their claim. It is sought to substantiate this line of defence by a combined reading of the definitions of “chattels transfer” and “money-lender” in s. 2 (1) and of s. 22 of the Money-lenders’ Ordinance, 1951. The relevant provisions are:

“2. (1)

‘chattels transfer’ means a bill of sale, a letter of hypothecation, or a hire-purchase agreement;

.

‘money-lender’ includes every person whose business is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person

also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or agent; but shall not include:

- (a) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money.

“22. (1) The provisions of this Ordinance shall not apply:

- (a) to any money-lending transaction where the security for repayment of the loan and interest thereon is effected by execution of a chattels transfer in which the interest provided for is not in excess of 9 per cent. per annum.

.....

- “(3) Any person who only lends money by means of the type of transactions set out in sub-s. (1) of this section and by means of no other type of transaction shall be deemed not to be a money-lender for the purpose of this Ordinance.”

If I understand Mr. Vyas’ argument correctly it is that as this hire-purchase agreement is a chattels transfer within the meaning of the definition and as the rate of interest is in excess of 9 per cent. it is not within the saving provisions of s. 22. He argues quite correctly that under s. 11 (3) of the Ordinance the court is entitled to go behind the form of the transaction if it is satisfied that it is substantially one of money-lending. The fact that the payments are called monthly rentals is not conclusive. I agree, but the defence has called no evidence to impeach the agreement as being anything other than it says it is, viz. a hire-purchase agreement. It is an unusual proposition that a saving provision can supersede an earlier substantive provision of an Ordinance, or that it can bring into existence something which would otherwise not be there. I say this bearing in mind that there is no section corresponding to s. 22 in the English Acts. The short answer to this argument is that the cart is being put before the horse. Mr. Vyas has first to satisfy the court that this is a money-lending transaction, and that brings one back to the definition of “money-lender”. This definition, with a few additional words, which are immaterial, is taken from the definition in the English Money-lenders’ Act, 1900, and there is a long line of authority upholding the validity of these hire-purchase agreements by finance companies. I will review these authorities shortly in case other debtors should be minded to try and avail themselves of this unmeritorious defence. Our s. 2 (1) (a) is copied from the English Act, s. 6 (d) and among the businesses which have been held to fall within this exception are the financing of hire-purchase agreements by purchasing goods from one person and letting them out on hire-purchase to another: 27 Halsbury’s Laws of England (3rd Edn.) 21. The nature of the transaction is neatly described by Goddard, J., as he then was, in *Mercantile Union Guarantee Corporation Ltd. v. Wheatley* (1), [1937] 4 All E.R. 713 at p. 718:

“A man goes to another and says: ‘I should like to buy a particular piece of machinery, or a particular vehicle, on hire-purchase. I cannot put down the money. The dealer will not sell it except for cash. Will you go and buy it for me?’ To this the other man agrees, and he makes out a hire-purchase agreement, which is then and there signed. After the agreement is signed, the man goes and buys the machine, and bails it to the person who wants to get it on hire-purchase. I see nothing wrong in that, and I do not see that the transaction is void in any form.”

In *Old Discount Co. Ltd. v. Playfair Ltd.* (2), [1938] 3 All E.R. 275 it was held

that the ordinary method of financing hire-purchase transactions is not a money-lending operation and that therefore finance companies engaging in these transactions do not require to be registered under the Money-lending Acts. Again to quote from Simonds, J., as he then was, in *Transport and General Credit Corporation Ltd. v. Morgan* (3), [1939] 2 All E.R. 17 at p. 28:

“It must be remembered that hire-purchase agreements now play a very large part in the commercial and social life of the community, and the financing of these hire-purchase agreements is an enormous business, both in the city of London and elsewhere. It appears to me that the financiers and the dealers co-operate in the common venture of making feasible the whole business of hire-purchase agreements, which is now, for good or for evil, a necessary part of our social life. To regard one party to that common venture, which is now a recognised mercantile service, as carrying on the business of a money-lender is, as I have said before, an abuse of language.”

The essence of the transaction is that the finance company becomes the owner of the article and hires it out at a rental; he does not lend money: *Drury v. Buckland Ltd.* (4), [1941] 1 All E.R. 269. If the transaction was not a genuine sale to the plaintiffs and a re-hire by them but was a loan by them to the first defendant on the security of the car the agreement would probably be a bill of sale which would require to be registered under the Bills of Sale Ordinance: *Polsky v. S. and A. Services* (5), [1951] 1 All E.R. 185. But I am satisfied that this was a genuine sale. All these cases and others were fully considered by Edmunds, J., in *Premchand Raichand Ltd. v. A. D. Prinja and Another* (6), Kenya Supreme Court (Mombasa), Civil Case No. 32 of 1960 (unreported) where the facts were similar. He also dealt with the point that the initial payment had been made by the customer to the dealer, and not to the finance company, and concluded that the dealer received that payment notionally and technically on behalf of the finance company, who were the purchasers of the vehicle. I respectfully agree.

In the result there will be judgment for the plaintiffs against both defendants jointly and severally for Shs. 2,348/73 with interest and costs.

Judgment for the plaintiffs.

For the plaintiffs:

AI James

For the defendants:

MP Vyas

For the plaintiffs:

Advocates: *Hunter & Greig*, Kampala

For the defendants:

MP Vyas, Kampala

R v Salimu Kaggwa s/o E Mugema
[1961] 1 EA 153 (HCU)

Division:

HM High Court of Uganda at Mbale

Date of judgment: 17 January 1961
Case Number: 178/1960
Before: Sir Audley McKisack CJ

[1] Criminal law – Evidence – Admissibility – Statement by accused while in police custody – No compliance with Evidence (Statements to Police Officers) (No. 2) Rules, 1955, r. 8 (U.).

Editor's Summary

The Crown sought to offer in evidence a statement alleged to have been made by the accused to a police officer after being cautioned and whilst he was in custody but before he was charged with any offence. Under r. 8 of the Evidence (Statements to Police Officers) (No. 2) Rules, 1955, before a statement is taken from a prisoner he should be informed of the nature of the charge likely to be preferred against him; or alternatively he should be informed of the nature of the act in respect of which it is contemplated that proceedings may be taken against him. The police officer before giving the required caution said to the accused: "I am making enquiries in connection with the murder of A. It is alleged that you were one of those persons who took part in the murder. I have reason to believe you may be able to assist me in this investigation".

Held –

- (i) the words used by the police officer did not indicate that a charge was likely to be preferred against the accused and did not reveal whether it was likely or unlikely that proceedings would be instituted against the accused or that such proceedings were contemplated.
- (ii) there was not sufficient compliance with r. 8 of the Evidence (Statements to Police Officers) (No. 2) Rules, 1955, and therefore the alleged statement was inadmissible.

Order accordingly.

No cases referred to in judgment

Judgment

Sir Audley McKisack CJ: The accused was admittedly in lawful custody when the alleged statement which it is proposed to offer in evidence was taken by a police officer.

Rule 7 and r. 8 of the Evidence (Statements to Police Officers) (No. 2) Rules, 1955 (L.N. 133/55), demand that a statement shall not be taken from a prisoner unless a caution is first administered. It is not disputed that a proper caution was given. But has r. 8 been complied with? The prisoner was not charged with any offence, so to comply with the rule he had to be:

- (a) informed of the nature of the charge likely to be preferred against him; or alternatively be
- (b) informed of the nature of the act in respect of which it is contemplated taking proceedings against him.

The words used by the police officer in this case, before giving the caution, were:

"I am making enquiries in connection with the murder of A. It is alleged that you were one of those persons

who took part in the murder. I have reason to believe that you may be able to assist me in this investigation.”

I cannot find in those words any statement, either express or of necessary

implication, that a charge was *likely to be preferred* against the prisoner. Merely to say that “It is alleged” that the prisoner had taken part in the murder does not reveal whether it is likely or unlikely that the appropriate authority will institute proceedings against the prisoner. Still less does it say that such proceedings are contemplated by the appropriate authority. And the words which follow,

“I have reason to believe that you may be able to assist me in this investigation”,

are, if anything, even further from revealing the appropriate authority’s intentions with respect to the prisoner.

Consequently I rule that there was not a sufficient compliance with r. 8 of the rules, and the alleged statement is inadmissible.

Order accordingly.

For the Crown:

NM Patel

For the accused:

G Gray

For the Crown:

Advocates: *The Attorney-General*, Uganda

For the accused:

G Gray, Mbale

Sewano Wofunira Kulubya v Mistry Amar Singh [1961] 1 EA 157 (CAK)

Division: Court of Appeal of Kampala

Date of judgment: 25 January 1961

Case Number: 74/1960

Before: Sir Alastair Forbes V-P, Crawshaw JA and Sir Owen Corrie Ag JA

Appeal from: H.M. High Court of Uganda–Lyon, J

[1] *Native law and custom – Mailo land – Agreement to lease to non-African – Statutory consents not obtained – Illegal transaction – Whether parties in pari delicto – Whether African landowner can recover possession from non-African tenant – Land Transfer Ordinance, s. 2, s. 3 and s. 4 (1) (U.) – Possession of Land Law (Cap. 25) (Native Laws of Buganda), s. 2 – Buganda Native Laws (Declaration) Ordinance, s. 3 and s. 4 (b) (U.) – Limitation Ordinance, 1958, s. 32 (1) (U.) – Rent Restriction*

Ordinance, 1949 (K.).

Editor's Summary

The appellant, an African, who was the registered proprietor of certain “mailo” land, had entered into an agreement to lease the land to the respondent, an Asian, who took occupation. After some years the appellant served a notice on the respondent terminating the agreement and later instituted proceedings for possession. The plaint included claims for rent, mesne profits and damages which were subsequently abandoned. The respondent claimed that as the agreement to lease was illegal, the appellant could not file an action founded on it. By the Land Transfer Ordinance of Uganda and the Possession of Land Law of Buganda a lease of “mailo” land must have the consents of the Governor and the Lukiko respectively, which were not obtained. The trial judge held that both the parties were in *pari delicto* and dismissed the action. On appeal, it was contended, *inter alia*, for the appellant that the trial judge had erred in holding that the parties were in *pari delicto* since the object of the Land Transfer Ordinance and the Possession of Land Law was to protect African landowners against non-African tenants, and that the trial judge had also erred in not holding that the appellant was entitled to possession as the registered proprietor of “mailo” land who had withdrawn his consent to occupation thereof by the respondent.

Held –

- (i) the Land Transfer Ordinance was clearly enacted for the protection of Africans and the object of the Possession of Land Law was clearly to protect Africans and to preserve African land for use by Africans, and in so far as the recovery of land which was unlawfully occupied was concerned, the African landowner was to be regarded as a member of a protected class and as not being in pari delicto with the non-African occupier.
- (ii) the appellant was entitled to rely upon his registered ownership of the premises and to recover possession from the respondent as from a trespasser and the respondent could only seek to set up a right of occupation which was illegal by statute.

Appeal allowed. Decree of the High Court as to appellant's claim for possession set aside. Decree for possession of the land and eviction of the respondent therefrom to be substituted.

Cases referred to:

- (1) *Reid Hewitt & Co. v. Joseph*, [1918] A.C. 717.
- (2) *Shantilal Nathabhai Patel v. Registrar of Titles* (1949), 16 E.A.C.A. 46.
- (3) *Pasmore v. Oswaldtwistle Urban Council*, [1898] A.C. 387.
- (4) *Cutler v. Wandsworth Stadium Ltd.*, [1949] A.C. 398; [1949] 1 All E.R. 544.
- (5) *Doe v. Bridges* (1831), 1 B. and Ad. 847.
- (6) *Kiriri Cotton Co. Ltd. v. Ranchhoddas K. Dewani*, [1958] E.A. 239 (C.A.); (1960) E.A. 188 (P.C.).
- (7) *Motibhai Manji v. Khursid Begum*, [1957] E.A. 101 (C.A.).
- (8) *Browning v. Morris* (1778), 2 Cowp. 790; 98 E.R. 1364.
- (9) *Bowmakers Ltd. v. Barnet Instruments Ltd.*, [1944] 2 All E.R. 579.
- (10) *Sajan Singh v. Sardara Ali*, [1960] 1 All E.R. 269.
- (11) *Gas Light and Coke Co. v. Samuel Turner*, 6 Bing. N.C. 324; 133 E.R. 127.
- (12) *Alexander v. Rayson*, [1936] 1 K.B. 169.
- (13) *Charan Kaur and Another v. Mistry Makanji Vanmali* (1956), 23 E.A.C.A. 14.

January 25. The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes V-P: This is an appeal from a judgment and decree of the High Court of Uganda whereby the appellant's suit for possession of certain land was dismissed with costs.

The appellant is an African and the respondent is an Asian, and the suit concerned three plots of land, of the class of land known as "mailo", being plots Nos. H, S and T, part of land near Nakivubo, comprised in Mailo Register, Vol. 750, folio 12, of which the appellant is the registered proprietor.

In his amended plaint the appellant, after pleading that he was the registered proprietor of the land in

question, continued:

- “3. By an agreement made the 21st day of November, 1946, the plaintiff leased to the defendant plot No. ‘T’ being part of the land comprised in Mailo Register, Vol. 750, folio 12, for one year from the 1st day of November, 1946, at a rent of Shillings three hundred (Shs. 300/-) such rent being payable in advance, such lease to be renewable from year to year.
- “4. By an agreement made the 29th day of March, 1946, the plaintiff leased to the defendant plot No. ‘H’ being part of the land comprised in Mailo Register, Vol. 750, folio 12, for one year from the 1st day of March, 1946, at a rent of Shillings three hundred (Shs. 300/-) such rent being

payable in advance, such lease to be renewable from year to year.

- “5. By an agreement made the 1st day of October, 1947, the plaintiff leased to the defendant plot No. ‘S’ being part of the land comprised in Mailo Register, Vol. 750, folio 12, for one year from the 1st day of September, 1947, at a rent of Shillings two hundred and forty (Shs. 240/-) such rent being payable in advance.
- “6. On the termination of the tenancies above referred to the defendant held over on each of them as a tenant from year to year at an increased rent of Shillings three hundred and fifty (Shs. 350/-) in respect of the said plot ‘T’ and Shillings three hundred and Shillings two hundred and forty (Shs. 300/- and Shs. 240/-) respectively in respect of plots ‘S’ and ‘H’ in accordance with cl. 5 of each of the tenancy agreements above referred to.
- “7. The consents necessary to any of the above leases were not obtained.
- “8. On the 12th day of November, 1959, notice to quit the said plots ‘S’, ‘T’ and ‘H’ was given to the defendant, such notice to be effective on the 1st day of January, 1960. Copies of such notices were annexed to the original plaint herein and marked ‘A’.
- “9. The defendant has neither paid nor tendered any rent in respect of the said land subsequent to the 31st day of December, 1958, and remains illegally in occupation of the land.”

The plaint included claims for rent, mesne profits and damages, which were subsequently abandoned by the reply to the written statement of defence.

By his written statement of defence the respondent pleaded, *inter alia*, that:

“the plaintiff was party to illegal agreements. The said agreements are referred to in paras. 3, 4 and 5 of the plaint. Therefore the plaintiff is not entitled to file any action on the said agreements.”

The written statement of defence included a counterclaim for specific performance, but this also was withdrawn at a later stage. The learned trial judge, relying on *Reid Hewitt & Co. v. Joseph* (1), [1918] A.C. 717, at the commencement of the case ordered that the appellant’s claims for rent, mesne profits and damages be dismissed with costs, and subsequently ordered that the counter-claim be dismissed with costs. These orders are not challenged on the appeal.

It is convenient at this point to set out the relevant statutory provisions. These are contained in the Land Transfer Ordinance (Cap. 114 of the 1951 edition of the Laws of Uganda), and the Possession of Land Law (Cap. 25 of the 1957 revised edition of the Native Laws of Buganda). Section 2, s. 3 and s. 4 (1) of the Land Transfer Ordinance, omitting the provisos to s. 2 which are not relevant to this case, read as follows:

- “2. No non-African or any person acting as his agent shall without the consent in writing of the Governor occupy or enter into possession of any land of which an African is registered as proprietor (otherwise than by receiving rents and profits payable by non-Africans who have gone into occupation or possession with the consent of the Governor) or make any contract to purchase or to take on lease or accept a gift inter vivos or a bequest of any such land or of any interest therein other than a security for money: . . .
- “3. The Governor may refuse the consent mentioned in s. 2 of this Ordinance without assigning any reason or may specify terms upon which such consent is conditional.
- “4.(1) Any person who commits a breach of the provisions of this Ordinance or of any terms imposed by the Governor under s. 3 shall be

guilty of an offence and shall be liable on conviction to a fine not exceeding Shs. 2,000/- or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment.”

Paragraphs (d) and (k) of s. 2 of the Possession of Land Law, omitting the proviso to sub-s. (d) which again is not relevant, read as follows:

“2.(d) The owner of a mailo shall not permit one who is not of the Protectorate to lease, occupy or use his mailo except with the approval in writing of the Governor and the Lukiko:

.....

“(k) The owner of a mailo who contravenes any provision of para. (c) or (d) of this section shall be liable on conviction to a fine not exceeding Shs. 500/- or to imprisonment not exceeding six months or to both such fine and imprisonment.”

The statutory force of laws such as the Possession of Land Law made by the Kabaka and Lukiko of Buganda is recognised by the Buganda Native Laws (Declaratory) Ordinance (Cap. 71 of the 1951 edition of the Laws of Uganda), s. 3 and s. 4 of which read as follows:

- “3. For removing doubts it is hereby declared that as from the date and by virtue of the terms of the Uganda Agreement, 1900, and by virtue of the terms of the Buganda Agreement (Native Laws), 1910, and the agreement set out in the Schedule to this Ordinance, the Kabaka of Buganda has had power to make laws binding upon all natives in Buganda, and the right of the Kabaka hereafter to exercise such power is hereby expressly confirmed for so long as the said agreements shall continue to be of full force and effect but subject always to the terms of the said agreements and to any amendments which may hereafter be made thereto.
- “4. All laws heretofore lawfully enacted by the Kabaka since the date of the execution of the said Uganda Agreement, 1900, are hereby declared to be, or, for the period of their validity, to have been, binding upon all natives in Buganda.”

It may be noted that such laws are expressed only to be “binding upon all natives in Buganda”; though, as was said by this court in *Shantilal Nathabhai Patel v. Registrar of Titles* (2) (1949), 16 E.A.C.A. 46 at p. 49,

“the effect of such a law may be . . . indirectly to bind non-natives in their dealings with natives.”

There was no dispute between the parties as to the facts, the agreed facts being stated in the High Court as follows:

“Plaintiff an African, registered proprietor of Mailo land.

“Defendant Indian.

“Plot T leased for one year on November 1, 1946. Agreement March 21, 1946. Shs. 300/- p.a., payment in advance and yearly.

“Plot H leased for one year. November, 1946. Agreement March 29, 1946. Shs. 300/- p.a., payable in advance and yearly.

“Plot S leased for one year from September 1, 1947. Shs. 240/- p.a., payable in advance, and thereafter yearly.

“After one year plot T rent increased to Shs. 350/- p.a. Non-registered tenancy existed for plots H, S and T. Leases were void—Vol. III.

“Consent of Governor and Lukiko never obtained although it was sought after the agreements. Lukiko refused November 12, 1949. Notice

to quit served on defendant on November 13, 1959, for the 31st day of December, 1959, for each of the plots. Rent was paid to the plaintiff up to and including December 31, 1958, for each of the plots. The defendant entered into occupation of the three plots in 1946 and 1947, and has remained in occupation contrary to s. 2 of the Land Transfer Ordinance.”

It was also conceded that the respondent had been guilty of an offence under s. 4 of the Land Transfer Ordinance, and that the appellant had been guilty of an offence under s. 2 (k) of the Possession of Land Law.

The issues for trial by the High Court were agreed and were as follows:

- “1. Are the parties not in *pari delicto* being each in turn guilty of an offence in permitting and taking a lease?
- “2. If yes, can the plaintiff recover possession on the strength of the illegality of the lease to which he was a party?
- “3. Has any possession or property been transferred by the illegal agreements?
- “4. Having pleaded illegality in order to support its claim and seeking to found his claim on the illegal contracts, can the plaintiff recover possession or obtain an injunction to restrain the alleged trespass?”

The learned trial judge’s conclusions on these issues were as follows:

“On the issues as framed and agreed by counsel I find that the parties in the instant case are in *pari delicto*. Both parties knew all their transactions were illegal, both of them knew that consent, the necessary consents, had been refused, yet the plaintiff allowed the defendant to occupy the plots in dispute for over thirteen years, and accepted rent for many years, and now seeks an order for eviction in circumstances where even if the so-called lease were valid no proper notice to quit has been given. The plaintiff’s claim has no merit; and I am surprised that the court was ever troubled with it. All the transactions were illegal, and certainly the plaintiff does not come to this court with clean hands.

“On the agreed facts as framed by counsel, I find that the parties are in *pari delicto*. I answer the second issue—can the plaintiff recover possession—in the negative, and I answer issues 3 and 4 in the negative.

“On the whole case I hold that the parties were, and are, in *pari delicto*, and that the plaintiff’s remaining claims cannot therefore be entertained.”

The appellant now appeals on the following grounds:

- “(a) That the learned judge erred in holding that the parties were in *pari delicto* in that he failed to take into account that—
 - (i) the maximum fine and period of imprisonment permitted for a breach of the Land Transfer Ordinance are respectively four times and twice those permitted by the Possession of Land Law;
 - (ii) the object of the Land Transfer Ordinance and the Possession of Land Law was, and is, to protect African landowners against non-African tenants.
- “(b) That if (which is denied) the parties were in *pari delicto*, the learned judge erred in holding that the doctrine in *Browning v. Morris*, 98 E.R. 1364 did not apply.
- “(c) That the learned judge erred in not holding that the plaintiff was entitled to possession as against the defendant as (i) the latter had no estate or interest in the land concerned of which the plaintiff was the registered proprietor, and (ii) the plaintiff had withdrawn his consent to the occupation by the defendant of the land concerned with effect from the 1st day of January, 1959.
- “(d) That the learned judge erred in holding that the plaintiff was suing

on an illegal contract.”

As regards ground (a), I do not think that the mere fact that a different penalty is incurred by the different parties to an illegal transaction is itself a reason for saying that the parties are not in *pari delicto*. In general, the fact that a statute imposes penalties on both parties to a transaction, albeit penalties of different severity, would seem to me to be a strong indication that the legislature intended the respective penalties to be the only consequence of a breach of the statute, that each party should be regarded as being as much a party to the breach of the statute as the other, and that no right to a civil action should arise. In *Pasmore v. Oswaldtwistle Urban Council* (3), [1898] A.C. 387 at p. 394, the Earl of Halsbury, L.C., said:

“The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe v. Bridges* (1831), 1 B. and Ad. 847, 859. He says: ‘where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner’.”

And in *Cutler v. Wandsworth Stadium Ltd.* (4), [1949] A.C. 398 at p. 411, Lord Du Parcq, after referring to the *Oswaldtwistle* case (3), and the “general rule” stated by Lord Tenterden in *Doe v. Bridges* (5) (1831), 1 B. and Ad. 847 said:

“I do not agree with Mr. Pritt’s submission that it is heretical to regard criminal proceedings which may be followed by fine and imprisonment as a ‘specified manner’ of enforcing a duty. I think that it is both orthodox and right so to regard them.”

In *Cutler’s* case (4), the statutory penalty was incurred by one party only. In a case where both parties incur penalties it seems to me that the presumption in favour of the “general rule” must necessarily be very strong. Nevertheless, I do not think that it is conclusive. In the *Oswaldtwistle* case (3), at p. 397 Lord Macnaghton, referring to the passage cited above from the judgment of the Earl of Halsbury, said:

“The law is stated nowhere more clearly or, I think, more accurately, than by Lord Tenterden in the passage cited by my noble and learned friend on the woolsack. Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience.”

In *Cutler’s* case (4), at p. 413, Lord Normand said:

“If there is no penalty and no other special means of enforcement provided by the statute, it may be presumed that those who have an interest to enforce one of the statutory duties have an individual right of action. Otherwise the duty might never be performed. But if there is a penalty clause the right to a civil action must be established by a consideration of the scope and purpose of the statute as a whole.”

The principle thus stated was applied by this court in *Kiriri Cotton Co. Ltd. v. Ranchhoddas K. Dewani* (6), [1958] E.A. 239 (C.A.), and that decision was subsequently approved by their lordships of the Privy Council—see [1960] E.A. 188 (P.C.). The instant case does, in fact, present some special features.

In the first place, the position is unusual in that the relevant legislation is contained, not in one enactment, but in two enactments enacted by different legislative bodies. The Protectorate legislature has enacted the Land Transfer Ordinance which, on the face of it, is clearly for the protection of a class of persons, that is to say, Africans. This court has, in fact, already held the Ordinance to be for protection of Africans—see *Motibhai Manji v. Khursid Begum* (7), [1957] E.A. 101 (C.A.). The Ordinance applies throughout the territory and could, had the Protectorate legislature so intended, have been framed so as to impose a penalty on Africans who permitted the occupation of land by non-Africans. As was remarked in the case just cited, the wording of the Ordinance is very wide. I think it is clearly to be gathered from the scope and language of the Ordinance that the legislature regarded it as an important matter of policy that non-Africans should not be allowed, without the necessary consents, to occupy African owned land, and so framed the Ordinance as to prevent informal as well as formal transactions.

In addition to this legislation, which is clearly intended for the benefit of Africans as a class, the legislature of Buganda has enacted the Possession of Land Law which, within Buganda, imposes a penalty on the African owner of land who permits “one who is not of the Protectorate” to occupy his land. I have no doubt that, if the Land Transfer Ordinance stood alone, it must be held that an African permitting a non-African to occupy his land was not in *pari delicto* with the non-African, and that he could properly invoke the aid of the courts to recover his land. To hold otherwise would be to defeat the very purpose for which the legislation was enacted. Does the enactment of the Possession of Land Law alter the position in Buganda? I think not. In my view the enactment of the Possession of Land Law merely stresses the importance with which the matter is regarded, not only by the Protectorate legislature, but by the Buganda legislature, as a matter of public policy. The Possession of Land Law is certainly not a law enacted for the protection of persons “not of the Protectorate”. The intention of the law is clearly to preserve mailo land from unauthorised occupation by non-natives of the Protectorate; that is to say, the object is the same as the object of the Land Transfer Ordinance, though here, of necessity, enforced by penalty on the African owner of the land, non-natives being outside the jurisdiction of the Buganda legislature. Reading the two enactments as a whole, and bearing in mind the limitations governing the scope of Buganda laws, it does not appear to me that the enactment of the Possession of Land Law should be construed as derogating from the African landowner’s position as a member of a protected class, a position which he undoubtedly enjoys under the Land Transfer Ordinance. Notwithstanding the enactment of the Possession of Land Law with its penalty upon the African landowner in default, I think the object of the legislation as a whole is clearly to protect Africans and to preserve African land for use by Africans, and that, in so far as the recovery of land which is unlawfully occupied is concerned, the African landowner is to be regarded as a member of a protected class, and so, as not being in *pari delicto* with the non-African occupier. The position is unusual, but it seems clear that it would be contrary to public policy for the courts to refuse to assist an African to eject a non-African in illegal occupation of the former’s land, even though the African may have committed an illegal act in permitting the non-African to enter on the land.

The principle applicable is that expressed by Lord Mansfield in *Browning v. Morris* (8) (1778), 2 Cowp. 790; 98 E.R. 1364:

“... where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in *pari delicto*; and

in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.”

It is true that in the instant case the plaintiff can hardly claim that he himself has been either oppressed or imposed upon. But, as I have already said, the legislation is clearly intended to protect Africans as a whole from being imposed upon by non-Africans, and I think therefore the principle applies. Further, this is a suit for the recovery, not of money, as was the case in *Browning v. Morris* (8), but of possession of land as to which the legislature has made it abundantly clear that public policy requires that the non-African respondent should not be in occupation of the land. This means that the existence of a right of action to recover possession is not merely not contrary to public policy, but is positively required by public policy. In the circumstances, can it be doubted that the action lies?

I derive some support for the view I have taken from sub-s. (1) of s. 32 of the Limitation Ordinance, 1958 (No. 46 of 1958), to which Mr. Troughton, who appeared for the appellant, drew attention. The relevant part of that sub-section reads as follows:

“32. (1) Nothing in this Ordinance shall:

- (g) prejudice the operation of the Land Transfer Ordinance, or apply to an action to recover possession of land if the defendant has entered into or is in possession or occupation of the land in contravention of or without having complied with the provisions of the Land Transfer Ordinance.”

If I should be wrong as to the foregoing conclusion, I still think the appellant is entitled to succeed on the basis of the principle that an owner is entitled to recover his own property so long as his claim is not founded on an illegal contract. In *Bowmakers Ltd. v. Barnet Instruments Ltd.* (9), [1944] 2 All E.R. 579, Du Parcq, L.J., delivering the judgment of the Court of Appeal in England, said at p. 582:

“*Prima facie*, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man’s goods have got into another’s possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority. It would indeed be astonishing if (to take one instance) a person in the position of the defendant in *Pearce v. Brooks* (1866), L.R. 1 Exch. 213, supposing that she had converted the plaintiff’s brougham to her own use, were to be permitted, in the supposed interests of public policy, to keep it or the proceeds of its sale for her own benefit. The principle which is in truth followed by the courts is that stated by Lord Mansfield, that no claim founded on an illegal contract will be enforced, and for this purpose the words ‘illegal contract’ must now be understood in the wide sense which we have already indicated, and no technical meaning must be ascribed to the words ‘founded on an illegal contract’.”

In *Sajan Singh v. Sardara Ali* (10), [1960] 1 All E.R. 269 the Privy Council applied this principle where recovery of a lorry was sought, though the property in the lorry had been acquired as the result of an illegal contract.

Mr. Khanna, for the respondent, referred to the *Gas Light and Coke Company v. Samuel Turner* (11), 6 Bing. N.C. 324; 133 E.R. 127; *Alexander v. Rayson*

(12), [1936] 1 K.B. 169; and *Charan Kaur and Another v. Mistry Makanji Vanmali* (13) (1956), 23 E.A.C.A. 14, but I do not think those cases assist him. *Charan Kaur's* case (13), merely reaffirmed the principle that a suitor cannot found his case upon an illegal contract. The case originated in an application by the head tenant of a plot in Nairobi to the Kenya Central Rent Control Board for an ejectment order against his sub-tenants under certain sections of the Kenya Rent Restriction Ordinance, 1949, and for payment to him of rent in arrears. The premises in question had been unlawfully erected and occupied, and the Rent Control Board dismissed the application saying they would not lend themselves to any attempt to recover rent on such premises. This court supported the decision of the Rent Control Board, saying, *inter alia*:

“... not only must the board be satisfied that the premises are premises within the scope of the Ordinance but also they must be satisfied that the premises have been let under a lawful contract of tenancy which has been determined.

“The difficulty in the respondent's case was that he could not establish his claim either to possession or to the rent in arrears without proving a contract which, as we have said, was unlawful *ab initio*.”

It will be noted that the ratio decidendi was that the applicant/respondent in the appeal had to rely upon a contract which was unlawful. The relevance of the *Gas Light and Coke Company case* (11), is a passage in the judgment of Tindal, C.J., not in the report cited above, but in the report of the hearing of the case in the first instance in the Court of Common Pleas, 5 Bing. N.C. 666; 132 E.R. 1257, which is quoted in the passage set out below from the judgment of the Court of Appeal in England in *Alexander v. Rayson* (12). The facts of the case in *Alexander v. Rayson* (12), are not material, but the passage in question on which Mr. Khanna relies, which is at p. 186 of the report, reads as follows:

“In view of these various authorities it seems plain that, if the plaintiff had let the flat to the defendant to be used by her for an illegal purpose, he could not have successfully sued her for the rent, but the leasehold interest in the flat purporting to be granted by the lease would nevertheless have been legally vested in her. The result would have been that the defendant would be entitled to remain in possession of the flat without payment of rent until and unless the plaintiff could eject her without having to rely upon the lease or agreement. This curious aspect of the matter was alluded to by Tindal, C.J., in *Gas Light and Coke Co. v. Turner*. ‘It was observed’, he said, ‘in the course of argument for the plaintiffs, that, as they had granted a lease for twenty-one years, such term was vested in the defendant, and that he would be able to hold himself in for the remainder of it without payment of any rent. That point is not now before us; but, without giving any opinion how far the position is maintainable, it is obvious that, if an ejectment should be brought upon the breach of any condition in the lease, the action of ejectment would, at all events, be free from the objection that the court was lending its aid to *enforce* a contract in violation of law.’ In the present case the defendant does not, as a matter of fact, desire to remain in possession of the flat. She is, and has for some time been anxious to leave it. But, if the plaintiff has by his conduct placed himself in the same position in law as though he had let the flat with the intention of its being used for an illegal purpose, he has no one but himself to thank for any loss that he may suffer in consequence.”

Mr. Khanna argued, on the basis of this passage, that in the instant case the respondent had a year to year tenancy; that no proper notice to quit had

been given; and that therefore the appellant was driven to rely on the illegality of the tenancy. I do not think, however, that that is the position. As I understand the passage cited from *Alexander v. Rayson* (12), the situation envisaged is a special application of the principle affirmed in *Sajan Singh v. Sardara Ali* (10), that, where the property in something has passed, even though in pursuance of an illegal contract, the courts will uphold the title of the person actually having the property in such thing; the “property” in *Alexander v. Rayson* (12), being the leasehold interest in the premises, which had passed to the tenant. In the instant case, however, in view of the relevant legislation, there could be no leasehold interest vested in the respondent, who never acquired any form of property in the suit premises. In these circumstances, I think the appellant is entitled to rely upon his registered ownership of the premises and recover them from the respondent as from a trespasser.

It is true that in his pleadings the appellant sets out the illegal agreement, and in fact sought at first to base his claim for ejectment and claims for rent and mesne profits on the agreement. Such a claim, based on the illegal agreement, could not of course, be supported, and the claims for rent and mesne profits were in fact abandoned when the reply to the written statement of defence was filed. However, it was said in *Bowmakers Ltd. v. Barnet Instruments Ltd.* (9), at p. 582:

“... the form of the pleadings is by no means conclusive. More modern illustrations of the principle on which the courts act are *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724 and *Alexander v. Rayson*. But, as Lindley, L.J., said, at p. 729, in the former of the cases just cited:

‘Any rights which he’ (plaintiff) ‘may have irrespective of his illegal contract will, of course, be recognised and enforced.’

“In our opinion a man’s right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant’s possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim.”

In the instant case the appellant has pleaded that he is the registered proprietor of the land in question. The respondent can only seek to set up, in defence, a lease which is prohibited by express legislation, that is, a non-existent lease. I do not think the courts can recognise such a purported lease as passing any property in the land to the respondent, and consequently the whole property in the land remains vested in the appellant who need do no more than rely on his registered title. The respondent, indeed, is seeking to set up a right of occupation which is illegal by statute.

For the reasons I have given I think the appeal should be allowed with costs, that the judgment and decree of the High Court should be set aside in so far as it relates to the appellant’s claim for possession, and that a decree for possession of the land and eviction of the respondent therefrom be substituted. As regards costs in the High Court, I think the appellant should have the costs of the suit in so far as his claim for possession of the land and eviction of the respondent is concerned. As I have already mentioned, there was no appeal against the dismissal with costs of the appellant’s claim for rent, mesne profits and damages, so that order should stand.

Crawshaw JA: I agree with the application by the Hon. Vice-President of the principles expressed both in the case of *Browning v. Morris* (8), and in the case of *Bowmakers Ltd. v. Barnet Instruments Ltd.* (9), and that in

the circumstances of the present case the appellant was entitled to recovery of his land. As I understand Mr. Khanna, he argues that the respondent is entitled to rely on the terms of the lease but not the appellant and, the lease being from year to year, there is no definite date of termination and it is impossible for the appellant ever to recover the land. It seems to me that this would create a most astonishing situation, and not one which is supported by the authorities. I agree that the appeal should be allowed on the terms stated by the Hon. Vice-President.

Sir Owen Corrie Ag JA: By his amended plaint, the appellant, an African, who is the registered proprietor of mailo land in Buganda claimed against the respondent, an Asian, (a) the possession of the said land and eviction of the respondent therefrom; (b) mesne profits from January 1, 1959, at the rate of Shs. 890/- per annum until possession is granted; (c) an injunction perpetually restraining the respondent from trespassing on the said land with costs and damages.

The respondent counter-claimed seeking specific performance of certain agreements between the parties or in the alternative damages for non-performance.

It was common ground that by agreements dated respectively March 29, 1946, November 21, 1946, and October 1, 1947, the appellant agreed to lease to the respondent three plots of land referred to in the pleadings as plots H, T and S. These agreements required for their validity the consent of the Governor and of the Lukiko. Application was made to the latter for consent which was refused. The parties nevertheless appear to have treated the agreements as though they were valid. The respondent remained in possession of the three plots and paid the appellant what is described as “rent” until December 31, 1958. On November 12, 1959, the appellant gave the respondent notice to quit the plots, to be effective on January 1, 1960.

In his reply to the respondent’s defence the appellant abandoned his claim for rent, mesne profits and damages, and during the hearing in the High Court the respondent withdrew his counter-claim. The appellant’s claim thus became simply a claim by a registered owner for recovery of possession from an occupier whose only title to possession rested upon the appellant’s permission, which had been terminated by the notice to quit. In *Bowmakers Ltd. v. Barnet Instruments Ltd.* (9), [1944] 2 All E.R. 579, Du Parcq, L.J., delivering the judgment of the court, said (at pp. 582–3):

“In our opinion a man’s right to possess his own chattels will as a general rule be enforced against anyone who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant’s possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality to support his claim.”

I know of no reason why a different rule should apply to possession of land.

It follows, in my view, that the appellant is bound to succeed notwithstanding that the respondent’s possession was founded upon illegal transactions between the parties; and whether, in relation to those illegal transactions, the parties were or were not in *pari delicto*. Accordingly, I do not find it necessary to express any view upon this aspect of the case. Rejection of the appellant’s claim would have the result that the respondent, a non-African, would be entitled to remain permanently in possession of African land, to the exclusion of the registered African owner, without payment of any nature whatsoever.

I agree that the appeal should be allowed; that the judgment and decree

of the High Court should be set aside in so far as it relates to the appellant's claim for possession; and that a decree be substituted for possession of plots H, T and S and for eviction of the respondent therefrom.

I see no reason to grant an injunction against the respondent and the appellant's claim in that respect should be dismissed.

The appellant should have the costs of this appeal and his costs in the High Court in respect of his claim for possession and for eviction of the respondent.

Appeal allowed. Decree of the High Court as to appellant's claim for possession set aside. Decree for possession of the land and eviction of the respondent therefrom to be substituted.

For the appellant:

JFG Troughton

For the respondent:

DN Khanna

For the appellant:

Advocates: *Hunter & Greig*, Kampala

For the respondent:

Haque, Dalal & Singh, Kampala

Nirmal Singh s/o Uttam Singh v Ram Singh s/o Saun Singh
[1961] 1 EA 168 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	7 January 1961
Case Number:	94/1959
Before:	Sir Kenneth O'Connor P, Gould and Crawshaw JJA
Appeal from:	H.M. Supreme Court of Kenya—Connell, J

[1] *Bankruptcy – Discharge – Effect of discharge upon adjudication – Right of bankrupt to sue after discharge – Cause of action arising prior to bankruptcy – Action by trustee joining bankrupt as co-plaintiff – Suit dismissed – Appeal by discharged bankrupt alone – Whether entitled to sue or prosecute appeal – Whether property still vested in trustee after discharge – Civil Procedure (Revised) Rules, 1948, O. I, r. 1, r. 10 (2); O. VI, r. 29 (K.) – Bankruptcy Ordinance (Cap. 30), s. 20, s. 29 (9), s. 33 (2) (K.) – Rules of the Supreme Court, 1883, O. XXV, r. 4 – Eastern African Court of Appeal Rules, 1954, r. 62 (4) (c), (g), r. 72 (2).*

Editor's Summary

The appellant executed a second mortgage for Shs. 15,000/- in favour of the respondent on July 20, 1951, in exchange for a cheque for Shs. 14,684/50 being the loan less expenses. Receipt of the loan was acknowledged in the deed but the appellant alleged that at the request of the respondent he did not present the cheque to the bank. The appellant was still in possession of the cheque on August 8, 1951, when having then filed his petition in bankruptcy a receiving order was made against him. He was adjudicated a bankrupt on February 8, 1952, and on October 8, 1954, he obtained an order for his discharge, which was suspended for six months. On May 10, 1957, the Official Receiver as "trustee of the property" of the appellant sued the respondent for Shs. 15,000/- in the Supreme Court joining the appellant as second plaintiff. The trial judge came to the conclusion that the respondent had paid the money to the appellant and that the plaintiffs had no claim against him. The appellant thereupon appealed, but not so the Official Receiver, and at the hearing a preliminary

objection taken by the respondent was that the appellant never had any status in the suit and was not competent to file the appeal because the Official Receiver was at all material times trustee of the appellant's estate and any benefit from the suit would pass to him on behalf of the creditors. It was contended for the appellant that the right to sue vested in the appellant before his bankruptcy and that after his discharge it returned to him as no action had by then been taken on the cheque, but that the trustee, not having obtained his release, was also entitled to sue, and that it was therefore proper for both to be joined as parties to the suit. It was further argued that in any event the appellant, not having been struck out as a party to the suit, could not be refused a right to appeal.

Held –

- (i) a discharge does not annul an adjudication in bankruptcy and the property in bankruptcy remains vested in the trustee.
- (ii) in the instant case the appellant had no locus standi; he was improperly joined as a party and his name should be struck out of the proceedings: *William Henry Rochfort v. Thomas Battersby, Elizabeth Browne and Others* (1849), 2 H.L. Cas. 388; 9 E.R. 1139 applied.

Per Crawshaw JA: “Had it not been for the dismissal of this appeal on another ground, it would . . . have been necessary to consider whether the appeal should be dismissed under r. 72 (2) of the Eastern African Court of Appeal Rules. This court has on other occasion had to comment adversely on the failure of advocates to comply fully with the provisions of the rules . . .”

Appeal dismissed.

Cases referred to:

- (1) *In re Byrne, Ex parte Henry*, 9 Morr. 213.
- (2) *Boaler v. Power and Others*, [1910] 2 K.B. 229.
- (3) *The Metropolitan Bank Ltd. and Arthur Cooper, the Liquidator thereof v. Alexander Gopsell Pooley*, [1885] 10 A.C. 210.
- (4) *William Henry Rochfort v. Thomas Battersby, Elizabeth Browne and Others* (1849), 2 H.L. Cas. 388; 9 E.R. 1146.
- (5) *Ngambo Estate and Saw Mills Ltd. v. Sikh Saw Mills (Tanganyika), Ltd.*, E.A.C.A. Civil Appeal 84 of 1954 (unreported).

January 7. The following judgments were read:

Judgment

Crawshaw JA: This is an appeal against the dismissal by the Supreme Court of Kenya of the appellant's claim against the respondent in respect of a loan for Shs. 15,000/- alleged by the respondent to have been paid to the appellant but which the appellant said he never received.

It is not in dispute that on July 20, 1951, the appellant executed a second mortgage of his interest in a certain plot of land to the respondent on receipt from the latter of a cheque for Shs. 14,684/50, being the balance of the Shs. 15,000/- after the respondent had paid the legal expenses, stamp duty and registration

fees relating to the mortgage. The receipt of the loan was acknowledged in the deed. The appellant says that the next day, before he had presented the cheque to the bank, the respondent approached him asking him to retain the cheque for a few days as he had not at that time sufficient money in the bank to meet it. The appellant was still in possession of the cheque when on August 8, 1951, he filed his petition in bankruptcy, and on the same date a receiving order was made against him. He was adjudicated a bankrupt on February 8, 1952, and on October 8, 1954, he obtained an order for his discharge, to be suspended for six months.

The appellant says that the respondent from time to time made further requests that the presentation of the cheque should be deferred because of lack of funds to meet it, and the appellant retained possession of it until he handed it to the Official Receiver as trustee of his estate on, the appellant says, July 15, 1952. Before this time it would seem that the Official Receiver knew nothing about the outstanding cheque, nor that the loan shown in the second mortgage deed was alleged by the appellant not to have been received by him. The appellant did not show the respondent as a debtor in his statement of affairs, nor apparently did he mention the matter in his preliminary statement, nor at the first meeting of creditors, nor at the first hearing of his public examination in March, 1952.

The plot of land concerned was held by the appellant, Partap Singh, Pritam Singh and the respondent in equal shares, and the Official Receiver was trustee in bankruptcy also of the estate of Partap Singh. On May 29, 1952, the Official Receiver agreed to sell the shares of Partap Singh and the appellant (whether subject to a prior mortgage or on re-payment thereof is not clear) to the respondent and Pritam Singh, and on July 9, 1952, executed the transfer. When handing the cheque to the Official Receiver on July 15, 1952, the appellant also handed him an affidavit of the same date in which he explained that he had never presented the cheque to the bank for payment, because the respondent had constantly kept on telling him that he was short of funds. It is to be observed that the appellant admits that shortly after filing his petition he informed an officer in the official receiver's office that he had received the mortgage money and out of it had paid Shs. 13,000/- to a creditor, Sardar Singh, and the remainder to other creditors and for advocate's fees—all presumably in the short interval between receiving the money and filing his petition. To the court from whose decision he is appealing he said that this was all untrue, and that he had never in the past received the money, and Sardar Singh himself gave evidence that in 1951 he was owed no money by the appellant and neither demanded nor received any.

The Official Receiver, on the strength of the appellant's affidavit, took up the matter of the cheque with the respondent and, being apparently dissatisfied, commenced proceedings against him, the appellant being joined as a second plaintiff. The Official Receiver sued as the "Trustee of the property" of the appellant. The plaint was not filed until May 10, 1957, the Official Receiver's explanation for the delay being the difficulty he had in obtaining an indemnity from the creditors, and the subsequent unavailability of the appellant. In his judgment the learned judge reviewed the evidence at length, and came to the conclusion that the respondent had paid the money to the appellant and that the plaintiffs had no claim against him.

Against this decision the appellant has appealed, but not so the Official Receiver. The respondent has taken a preliminary objection that the appellant never had any status in the suit, and is not competent to file this appeal, because the Official Receiver was at all material times the trustee of the appellant's estate, and any benefit from the suit would pass to him on behalf of the creditors. The learned judge did not, unfortunately, deal with this point although it was raised, if not very forcefully argued. It is a little difficult to see what right to relief is alleged in the plaint in respect of the appellant which would enable him to be joined as a party to the suit within the provisions of O. I, r. 1, of the Civil Procedure Code. Paragraphs 10 and 11 of the plaint read as follows:

- "10. On or about the 8th day of October, 1954, the second-named plaintiff obtained his discharge from his said bankruptcy proceedings but the first-named plaintiff is still the official trustee of his estate and property.
- "11. Both the plaintiffs therefore jointly and severally claim from

the defendant the said sum of Shs. 14,684/50 due by him as aforesaid to the second-named plaintiff's bankrupt estate."

In the written statement of defence, para. 4 reads as follows:

"The plaintiff No. 2 is not competent to sue for the recovery of the amount claimed or any other amount as since the issue by the defendant of the cheque mentioned in para. 3 of the plaint, the plaintiff No. 2 filed his petition in bankruptcy and was as a consequence thereof adjudged bankrupt."

It will be observed that the plaint admits that the Official Receiver was still the trustee of the appellant's estate, and that the debt was due to the estate. There was no reply to the written statement of defence.

Mr. Kapila appeared for the appellant in the lower court and Mr. Khanna for the Official Receiver. Mr. Kapila does not appear to have addressed the court on behalf of the appellant, but Mr. Khanna referred to causes of action vesting in the trustee, and to the power of the trustee to intervene if the "second plaintiff sued and obtained the proceeds" of the suit; he cited *In re Byrne, Ex parte Henry* (1), 9 Morr. 213, Mr. Mangat, who appeared for the respondent in the court below, as he has also before us, argued before the learned judge that the appellant had no right or title to the cheque after the petition had been filed, and that the property in it passed to the Official Receiver, and that the appellant had no status.

There can be no doubt that on adjudication the property of a bankrupt passes to the trustee (s. 20 of the Bankruptcy Ordinance (Cap. 30)) and this would quite clearly include the property in a cheque. In *Byles on Bills of Exchange* (21st Edn.), at p. 377, the position is distinguished between the receipt by a bankrupt of such an instrument before and after the holder's bankruptcy, in that in the latter case the bankrupt retains the property in it unless the trustee chooses to intervene.

It is difficult to see therefore what status the appellant could have, for although at the time of the filing of the suit he had obtained an unqualified discharge, his estate in bankruptcy still vested in the Official Receiver, who had not then, and still has not, obtained his release. Admittedly a discharged bankrupt is required, notwithstanding his discharge, to:

"give such assistance as the trustee may require in the realisation and distribution of such of his property as is vested in the trustee"

(s. 29 (9) of the Bankruptcy Ordinance). His being joined as a plaintiff in the instant suit could not, however, have been of any assistance to the trustee and it would, with respect, appear to have been wrong for the Official Receiver to have allowed the appellant to be joined with him.

Mr. Salter, for the appellant, submits, as I understand him, that the right to sue vested in the appellant before his bankruptcy and that after his discharge it returned to him, as no action had by then been taken on the cheque, but that the trustee, not having obtained his release, was also entitled to sue, and that it was therefore proper for both to be joined as parties to the suit. He says that although both had the right to sue, the trustee would, if this appeal were to succeed, be able to claim from the appellant any money he might recover, and that in any event the appellant, not having been struck out as a party to the suit, cannot be refused a right to appeal. Mr. Salter has been unable to refer us to any authority which expressly recognises the right of a discharged bankrupt to sue in respect of claims which are vested in the trustee, but submits that in the absence of any prohibition there is nothing to prevent him so doing, although he would have to account to the trustee for anything he recovered; the discharged bankrupt could be regarded, he says, as suing as agent of the trustee.

This would not however appear to be the position, nor I think is it supported by the *Byrne* case (1). In that case Byrne, an estate agent, had prior to a receiving order being made against him, negotiated a sale on behalf of a client, the fees for which had not been paid to him at the time the receiving order was made. Byrne was duly adjudicated bankrupt and obtained his discharge some eight months after the date of the receiving order. Shortly after his discharge the trustee in bankruptcy first heard of Byrne's outstanding claim against his client, and gave notice to the solicitors for both those parties of his interest as trustee. In spite of this, Byrne obtained judgment for and payment of the fees. The trustee applied to the court for and obtained an order declaring that he was entitled to the money recovered by Byrne. In these latter proceedings Byrne alleged that the fees had not become due to him until the sale had been completed, and that as this did not occur until after his discharge, no right at any time became vested in the trustee. The learned judge did not accept that the fees did not become payable until completion, and was of the opinion that the claim vested in the trustee on the debtor's bankruptcy. He decided the case, however, on the assumption that what the debtor alleged was in fact correct, and held that, even so, the right which the debtor had was property divisible amongst his creditors, and that the "cause of action" vested in the trustee and not in Byrne. The fact that Byrne himself obtained judgment does not I think further the appellant's argument, for the trustee was not a party to the suit, and it is not known whether the client (defendant) took the objection that Byrne had no locus standi, or that the court was even aware that Byrne had ever been involved in bankruptcy proceedings.

In *Boaler v. Power and Others* (2), [1910] 2 K.B. 229, the trustee in bankruptcy refused to proceed with an action commenced by Boaler prior to his bankruptcy. The action was thereupon struck out, and on an appeal against this order by Boaler, Farwell, J., reading the judgment of the court dismissing the appeal, and referring to one of the claims contained in the action, said

"This is property which, if recovered, would belong to his trustee in bankruptcy for the benefit of his creditors; there is no question of after-acquired property or his personal earnings; it is clear that he has no locus standi in respect of this."

Boaler had not, so far as the report shows, obtained his discharge, but had he done so I cannot see that the position would have been different.

Discharge from bankruptcy, and annulment or the setting aside of the adjudication, are two very different matters. A discharge does not annul the adjudication, and the property in bankruptcy remains vested in the trustee. The court may annul an adjudication where the debtor ought not to have been adjudged bankrupt or where the debts have been paid in full, and in such cases the property of the debtor reverts to him or vests in such other person as the court may appoint (s. 33 (2) of the Bankruptcy Ordinance), and this would include any rights which the trustee had not pursued and which were not then time-barred. It is I think possible that there has been confusion over this distinction in the instant case, giving rise to the present position. The propriety of joining the appellant may not perhaps have been given very careful consideration, for had the plaintiffs been successful, any moneys collected by them would have been claimed by the Official Receiver for the benefit of the creditors, presumably without objection from the appellant. It is only because the appellant has alone appealed, that the importance of his status has been fully realised, although it was, with respect, a matter with which the learned judge should have dealt.

If further authority was required, it could I think be found in the case of *The Metropolitan Bank Limited and Arthur Cooper, the Liquidator thereof v. Alexander Gopsell Pooley* (3), [1885] 10 A.C. 210, a House of Lords decision.

The facts of that case were rather complicated and not very much in point, and I do not think it is necessary to set them out. In the course of his judgment, however, the Earl of Selborne, L.C., said, at p. 219:

“It may also be a question, whether, if this act, which upon the showing of the plaintiff (the debtor) preceded the proceedings in bankruptcy, was an act amounting to a civil wrong against him, affecting him in respect, not of his person, but of his property, and in respect of which he had a right of action and was entitled to recover damages, and if that right of action was against the Metropolitan Bank, that as well as all other similar rights of action which he was entitled to at the time of the adjudication did not pass to the trustee in bankruptcy. So that, if any real damage had been sustained by him in respect of his property, and if there really was this right of action, he, as a bankrupt, would have no interest, after the adjudication, in that right of action. Therefore there is no right of action at all in him, and the whole thing is a bankrupt’s action for matters in respect of which the bankrupt, not having got rid of or annulled his bankruptcy, could not sue.”

He then went on to say that, without considering any further facts:

“this was not only a groundless statement of claim (by the debtor), but was also frivolous and vexatious.”

He had earlier observed that on the view he took of the case it would have made no difference had the debtor been discharged:

“without having got rid of and annulled the bankruptcy as wrong *ab initio*.”

Lord Blackburn in a concurring judgment, said at p. 223:

“As regards the second ground, assuming for the moment that it means something which was an injury to his estate for which an action could be maintained to recover damages, as long as the commission in bankruptcy remains, and his creditors are therefore entitled to take those damages, that would be a thing which the assignees would recover for the benefit of the creditors and not of the bankrupt himself. On both those grounds, on the face of this claim, it appears that there is no cause of action.”

The suit was dismissed under O. XXV, r. 4 of the Judicature Rules, 1883, which is in very similar terms to Kenya O. VI, r. 29, which reads:

“29. The court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly as may be just. All orders made in pursuance of this rule shall be appealable as of right.”

A more appropriate rule in the instant case is, perhaps, O I, r. 10 (2) which reads:

“10. (2) The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

An appeal to this court is by way of re-hearing, and it would be right for this court to make such order as it thinks ought to have been made by the court below. In an Irish case *William Henry Rochfort v. Thomas Battersby, Elizabeth Browne and Others* (4) (1849), 2 H.L. Cas. 388, reported also in 9 E.R. 1139, the House of Lords found itself in a similar position to that in which we are placed. There, however, the insolvent had been joined with his assignees in bankruptcy, together with a third party, as defendant in a suit. Judgment was given in favour of the plaintiff as against the assignees and the insolvent, and the insolvent appealed, but not the assignees. Objection had not been taken in the courts below to his being made a party, the question first being raised in the House of Lords. The Lord Chancellor held that the insolvent had been improperly made a party below, and said at p. 1148:

“Then, my Lords, the question is, whether you can hear him as an appellant? The moment you show that he had no recognized interest in the property or in the matter, there is an end of his competency to raise the question. It is not for him to raise that question here, any more than it would be for a stranger who, by accident or inadvertence, might have been made a party to a suit, but who had no connection with the subject matter at all. In such a case as that, the court would hold that a party appealing had improperly appealed, not having such an interest as entitled him to litigate upon the subject at all, and it appears to me that this appellant stands precisely in that position; and without at all entering into the merits of the case, which we are not called upon to discuss here, I am of opinion that this party is not competent to support this appeal; and on that ground I move your lordships that the appeal be dismissed.”

Being satisfied that the appellant in the instant case had no locus standi, and was improperly joined as a party, I would order that his name be struck out of the proceedings and that this appeal be dismissed with costs.

Mr. Mangat for the respondent took a further preliminary objection to the appeal with which, in the circumstances, it is not now necessary to deal, but as to which a few words should be said. It was that the appellant had failed, in filing his appeal, to attach to his memorandum copies of material and necessary documents as required by paras. (c) and (g) of r. 62 (4) of the Eastern African Court of Appeal Rules. Mr. Salter admits that there were documents which the advocates in charge of filing the appeal should have attached. Had it not been for the dismissal of this appeal on another ground, it would therefore have been necessary to consider whether the appeal should be dismissed under r. 72 (2). This court has on other occasions had to comment adversely on the failure of advocates to comply fully with the provisions of the rules, and in *Ngambo Estate and Saw Mills Ltd. v. Sikh Saw Mills (Tanganyika) Ltd.* (5), E.A.C.A. Civil Appeal 84 of 1954 (unreported), their lordships, in allowing an adjournment for the necessary amendments to be made to the record, observed that they would not be inclined much longer to extend the indulgence thereto for afforded, and that they had considered whether they should not order the costs of the adjournment to be paid personally by the appellant's advocates; they decided not to do so, only because the record had been prepared so soon after the enactment of the rules. This last consideration does not of course any longer apply.

Sir Kenneth O'Connor P: I agree. The appeal is dismissed with costs. There will be a certificate for two counsel.

Gould JA: I also agree.

Appeal dismissed.

For the appellant:

CW Salter QC, JK Winayak and MZA Malik

For the respondent:

NS Mangat QC and US Kalsi

For the appellant:

Advocates: *Johar & Winayak*, Nairobi

For the respondent:

US Kalsi, Nairobi

Re Janmohamed Ladha (Debtor) and an Application by GE Walji
[1961] 1 EA 175 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	16 March 1961
Case Number:	91/1960
Before:	Law J

[1] Bankruptcy – Property available for distribution – Attachment of goods by judgment creditor – Suit by wife claiming goods – Attachment raised on terms – Terms that goods transferred to third party – Bond by third party for value of goods – Payment to wife if suit successful – Payment into court if suit unsuccessful – Receiving Order against debtor – Wife’s suit withdrawn – Whether trustee or judgment creditor entitled to value of goods – Indian Code of Civil Procedure, 1908, s. 73; O. XXI, r. 2.

Editor’s Summary

The applicant, a decree holder with another decree holder obtained orders for the attachment of the debtor’s goods after which the wife of the debtor filed a suit claiming a declaration that the attached goods were her property. Subsequently by agreement between the decree holders and the attorney for the debtor the attachments were raised on terms that the goods were to be transferred to a third party who in consideration thereof executed a bond whereby he bound himself in the sum of Shs. 5,000/- the estimated value of the goods to pay the said sum into court if the wife’s suit failed. Later a receiving order was made against the debtor and the Official Receiver was appointed trustee of debtor’s estate in bankruptcy. The wife having then withdrawn her suit, both the Official Receiver and the applicant claimed the Shs. 5,000/-.

Held –

- (i) the goods had been sold to a third party bona fide and for value and when the debtor was adjudicated bankrupt the goods did not form part of his estate; accordingly the Official Receiver had no interest in the goods or in the money representing the goods.
- (ii) the sum of Shs. 5,000/- should be applied first in satisfaction of the charges of the broker who had attached the debtor’s goods and subject thereto between the decree holders, proportionately, if

need be.

Application allowed.

No cases referred to in judgment

Judgment

Law J: The motion raises questions of considerable difficulty which do not seem to be directly covered by authority.

The history of the matter is as follows. One Janmohamed Ladha was trading in Mwanza under the name of Janmohamed Ladha & Co., prior to the receiving order in bankruptcy made against him on July 7, 1958.

A firm called Amekas Macaroni Industries (hereinafter referred to as Amekas), had obtained a decree against Ladha in Arusha, in October, 1956, for some Shs. 1,700/-, and on September 12, 1957, a warrant of attachment of Ladha's goods in execution of that decree was issued by the Mwanza District Court. On September 13 the present applicant (hereinafter referred to as Walji) obtained a decree against Ladha in the Mwanza District Court in Civil Case No. 321 of 1957. Walji had already obtained an order for attachment of Ladha's goods before judgment, on August 2, 1957. Ladha's wife (hereinafter referred to as Mrs. Ladha) had objected to the order of August 2, 1957, on the grounds that

the goods were her property, having been assigned to her by Ladha, but her objection was dismissed on August 17, 1957, the court holding that the alleged assignment was fraudulent and void for want of registration. Mrs. Ladha then filed a suit (No. 505 of 1957) claiming a declaration that the attached goods were her property.

In March, 1958, agreement was reached between Amekas and Walji (the decree holders) and Ladha's attorney (the judgment debtor) that Amekas' attachment in execution and Walji's attachment before judgment should be raised and the goods the subject of these attachments transferred to one Mohamed Salum. In consideration of this transfer, Mohamed Salum executed a bond on March 14, 1958, whereby he stood surety for Shs. 5,000/-, the estimated value of the goods, and bound himself to pay the said sum of Shs. 5,000/- to the resident magistrate, Mwanza, in the event of Mrs. Ladha's declaratory suit failing. A copy of this bond was filed in both Amekas' and Walji's case files. In my view, the meaning and intention of this bond, and of the parties affected thereby, was that if Mrs. Ladha's declaratory suit succeeded, Mohamed Salum would pay her Shs. 5,000/- through the resident magistrate; if her suit failed, Mohamed Salum would pay Shs. 5,000/-, to be shared prorata by Amekas and Walji, through the resident magistrate. Mohamed Salum, as from March 14, 1958, became the legal owner of Ladha's goods, subject to payment of the value thereof either to Mrs. Ladha or to Amekas and Walji according as to how Mrs. Ladha's declaratory suit was determined. None of the interested parties had in mind, on March 14, 1958, the possibility of Ladha becoming bankrupt, or the consequences that such a bankruptcy would have in relation to their agreement for the transfer of Ladha's goods to Mohamed Salum.

On July 7, 1958, a receiving order was made against Ladha, on his own application, and on July 30 the Official Receiver was appointed trustee of Ladha's estate in bankruptcy. On March 4, 1959, Mrs. Ladha withdrew her declaratory suit. In these circumstances, to whom should the Shs. 5,000/- secured by Mohamed Salum's bond be paid? That is the issue now for determination. The Official Receiver claims the money as being part of the bankrupt's estate. Walji claims the money—or part of it—in satisfaction of his decree, under the bond of March 14, 1958.

Mr. Dastur for the Official Receiver resists Walji's claim. Firstly he submits that Walji's attachment before judgment conferred no rights on him to share in a rateable distribution of Ladha's assets, see s. 73 Indian Code of Civil Procedure, as Walji never applied for execution of his decree. I do not consider this to be a valid point. It is not essential for a decree-holder, before arriving at an agreement for the satisfaction for his decree with the judgment-debtor, first to apply for execution of his decree. When the arrangement which resulted in Mohamed Salum's bond of March 14, 1958, was agreed to by all the interested parties, there was no further necessity for Walji to apply for execution of his decree. Mr. Dastur further submits that the arrangement was an adjustment of the decree, and should have been recorded; see O. XXI, r. 2. But all payments under the arrangement were to be made through the court, and the bond securing the payments was filed. In these circumstances, I do not consider that the agreement was an adjustment such as to require certification and recording.

Mr. Dastur's principal submissions, supported by a wealth of authority, are to the effect that the mere obtaining of security does not give preference to a creditor over other creditors or over the Official Receiver. He points out that the attachments were raised because the surety provided security to the court, and no payments were received by the court until after the adjudication in bankruptcy. Mr. Fraser Murray, for the applicant, submits that the law relating

to execution is not relevant. If Mohamed Salum had paid cash for the goods, instead of executing a bond securing future payment, there could be no question of the Official Receiver laying claim to the money. He submits that the applicant waived his rights to apply to have Ladha's goods sold in execution, under an agreement whereby they were sold to Mohamed Salum, the proceeds of sale being payable to the applicant in the event of Mrs. Ladha's declaratory suit failing, as it did. Ladha's subsequent bankruptcy cannot affect the applicant's right to receive the money.

After careful consideration I have come to the conclusion that Mr. Murray's submissions are well-founded and must prevail. On March 14, 1958, Ladha's goods were sold to Mohamed Salum, bona fide and for value. When Ladha was adjudicated bankrupt, four months later, these goods formed no part of his estate. A receiving order places the debtor's estate in custody of the court. At the date of the receiving order in respect of Ladha's estate, the goods transferred to Mohamed Salum were no longer part of that estate. In Mr. Murray's words, the Official Receiver has not a shred of interest in those goods, or in the money representing those goods. I agree. In my opinion, this application succeeds. The Shs. 5,000/- owed by Mohamed Salum must be applied, firstly in satisfaction of the court broker's charges in connection with the attachments levied at the instance of the applicant and Amekas, and the balance must be paid to the applicant and Amekas, in satisfaction of their decrees, proportionately if need be.

Application allowed.

For the applicant:

WD Fraser Murray

For the Official Receiver:

PR Dastur

For the applicant:

Advocates: *Fraser Murray, Thornton & Company*, Dar-es-Salaam

For the Official Receiver:

PR Dastur, Dar-es-Salaam

Dalgety & Co Ltd v RED Cluer
[1961] 1 EA 178 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	6 March 1961
Case Number:	24/1960
Before:	Sir Ralph Windham CJ

[1] Agent – Indemnity – Contract made by agent for undisclosed principal – Ratification of contract by undisclosed principal – Claim under contract – Damages paid by agent to third party upon arbitration award – Whether agent entitled to indemnity from undisclosed principal for damages paid – Whether agent entitled to set-off damages against balance owed to principal upon other transactions – Indian Contract Act, 1872, s. 217, s. 222, s. 230 (2), s. 232.

Editor's Summary

By a contract note No. 559 dated August 19, 1959, the appellants agreed with Watkins Ltd., London, to sell and ship three hundred bags of coconuts. The appellants in fact were agents for the respondent who supplied the coconuts and the appellants sent to the respondent a memorandum of contract No. T.S. 6416, intimating that they had sold the coconuts on account of the respondent to Watkins Ltd. in London on terms contained in a contract note No. 559 which recorded that as his agents the appellants would not be liable for non-fulfilment of the contract or for loss or damage to the goods or for delay caused by force majeure. The respondent signed and sent a receipt to the appellants stating that "(I) hereby acknowledge and confirm your Contract No. T.S. 6416 dated August 14, 1959, for two hundred and fifty to four hundred bags coconuts". On arrival at London the coconuts were rejected by Watkins Ltd. as not complying with the description of "fresh" coconuts. The respondent repudiated the claim of Watkins Ltd. and instructed the appellants to take no further action but on October 19, 1959, the appellants wrote to the respondent stating that they had sold as his agents under a contract providing for arbitration and advising a settlement at a sum stated. The respondent did not reply for a whole month and, in the meantime, an arbitration in London followed under the clause in the contract and an award was made in favour of Watkins Ltd. After an unsuccessful appeal by the appellants on instructions from the respondent they paid to Watkins Ltd. the sum of Shs. 11,011/58 being the amount of the award and expenses incidental thereto and debited the respondent's produce account with that sum. Subsequently the respondent sued the appellants for the balance due on a trading account. The appellants claimed that they were entitled to set-off against what they otherwise owed to the respondent the sum of Shs. 11,011/58 as being a disbursement made by them for which the respondent was liable to indemnify them as they had made it as the respondent's agents. The trial magistrate held that they were not so entitled because the respondent was not liable to indemnify the appellants on the grounds that the appellants had entered into the contract with Watkins Ltd. as principals; and that the appellants in submitting the claim to arbitration and in paying on the award, in spite of the respondent's express instructions to the contrary, had acted outside the scope of their agency. On appeal it was submitted that the set-off claimed by the appellants was outside s. 217 of the Indian Contract Act and was not legally justified because the moneys against which the appellants sought to set-off the sum in dispute, were not received "in the business of the agency", since they related to other transactions between the appellants and the respondent in the capacity of principal and agent respectively, and not to the particular transaction the subject matter of which was the coconuts.

Held –

- (i) by signing the memorandum of the contract sent to him by the appellants the respondent ratified the contract which the appellants had entered into with Watkins Ltd. and also acknowledged that the appellants were in fact entering into the contract as his agents, although by reason of the non-disclosure of the agency to Watkins Ltd. the appellants were to be treated as contracting with Watkins Ltd. as principals.
- (ii) when a person acting for an undisclosed principal contracts with a third party he contracts with that party as an apparent principal and renders himself primarily liable to the third party as principal, while at the same time, as between himself and the undisclosed principal whom he is screening from the third party, he enters that contract as agent of the undisclosed principal, and can recover from the latter any sum that he has lawfully and reasonably spent in connection with the contract while acting within the scope of that agency.
- (iii) the appellants, in paying upon the award, were acting within the scope of their concealed agency, and their right to be indemnified by the respondent was not forfeited by reason of any non-compliance with the respondent's directions.
- (iv) where as in the present case, the parties have a running account, concerned with a number of different transactions which the one party conducts as agent for the other then the "business of the agency" includes all those transactions which are the subject of the running account and which are conducted between them upon the relationship of principal and agent.
- (v) the appellants were entitled in law to set-off and debit to the respondent Shs. 11,011/58 in their account with him.

Appeal allowed.

Cases referred to:

- (1) *Hichens, Harrison, Woolston & Co. v. Jackson & Sons*, [1943] A.C. 266; [1943] 1 All E.R. 128.
- (2) *Rhodes v. Fielder, Jones and Harrison* (1920), 89 L.J.K.B. 15.
- (3) *Christoforides v. Terry*, [1924] A.C. 566.

Judgment

Sir Ralph Windham CJ: This is an appeal by the defendant company against a judgment of the resident magistrate's court, Tanga, awarding Shs. 9,829/47 to the plaintiff-respondent as the balance due on a trading account. The correctness of this decision depended upon whether or not the appellants were entitled to set-off, against what they otherwise owed the respondent on this account, the sum of Shs. 11,011/58, as being a disbursement made by them for which the respondent was liable to indemnify them because they had made it as the respondent's agents. The learned resident magistrate held that they were not entitled so to set it off. The question at issue, both at the trial and in this appeal, was whether the learned magistrate was right in so holding.

The issue, together with the salient and undisputed facts, is clearly set out in the judgment of the learned magistrate in the following words:

“The dispute between the parties is whether defendant rightly debited plaintiff’s produce account with the company with this sum of Shs. 11,011/58. It is also not in dispute that the sum represents the amount paid by defendant to Watkins Ltd., London, as a result of a London arbitration award in respect of a shipment of three hundred bags of coconuts originally supplied by plaintiff, shipped through defendant per s.s. Braemar Castle,

August, 1959, and rejected on arrival at London by the ultimate buyer Watkins as not complying with the description of *fresh* coconuts. This rejection was subsequently followed, unknown to plaintiff, by the London arbitration. There was then an appeal, apparently instigated by plaintiff, which failed. The amount of the award was later paid to and under pressure from Watkins Ltd. contrary to plaintiff's express instructions by defendant's London office which sought recourse from the Tanga office which in turn debited plaintiff's produce account with defendant with the amount of the award and expenses incidental thereto. Defendant now asserts it had every right so to do on the grounds it was merely setting off a disbursement on plaintiff's behalf whilst acting as agent for plaintiff in the sale to Watkins Ltd. and in accordance with the defendant's general terms of business relating to such transactions made on behalf of clients."

The contract for the shipment and sale of the three hundred bags of coconuts was entered into between the appellants and Watkins Ltd. on August 14, 1959, and is evidenced by a contract note No. 559 (the number being erroneously given in the judgment below as 599), a copy of which is annexed to the appellants' rejoinder. On August 20, Watkins Ltd. confirmed it in writing. In this contract the appellant company appears as the vendor, and there is no mention of the respondent, or that the appellants are contracting as agents for anyone. The contract has an arbitration clause providing: "Any disputes arising under the contract to be settled by arbitration in London". On the same day, August 14, the appellants sent to the respondent a memorandum of the contract, No. T.S. 6416, intimating as follows:

"Dear Sir,

We have today sold the following coconuts for your account, subject to confirmation of cabled advice and the terms and conditions of the Dalgety & Company Ltd.'s contract note No. 559 to Messrs. W. C. Watkins Ltd., London."

There followed particulars of the shipment, and thereafter the following "Remark":

"We, as your agents, shall not be liable for the non-fulfilment of the contract or for loss or damage to the goods or for delay caused by force majeure as therein defined."

This memorandum was signed on behalf of the appellant company. On August 20, 1959, the respondent signed and sent a receipt to the appellants, annexure D. 4 to the rejoinder, stating that he does

"hereby acknowledge and confirm your contract No. T.S. 6416 dated August 14, 1959, for two hundred and fifty to four hundred bags coconuts."

He thereby ratified the contract No. 559 and acknowledged that the appellants were in fact entering into it as his agents, although by reason of the non-disclosure of the agency to Watkins Ltd. they were to be treated as contracting with the latter as principals.

The main reason why the learned trial magistrate held that the appellant company (defendant) was not entitled to claim from the respondent (plaintiff) the sum that it had paid to Watkins Ltd. under the arbitration award would seem, from his judgment, to be based on the fallacious argument that because Watkins Ltd. were, as in fact they were, unaware of the existence of the respondent, and because the appellants contracted as principals with Watkins Ltd. and rendered themselves liable to them as such, therefore the appellants had no right to claim from the respondent the sum which they had been liable

to pay, and had paid, to Watkins Ltd. with whom they had contracted as principals, notwithstanding that the respondent had agreed and acknowledged that, as between him and the appellants, the appellants had entered into that contract as his agents. The following passage from his judgment appears to indicate the way in which the learned magistrate's mind was working. After observing, quite correctly, that

“defendant as a principal or an agent for an undisclosed principal would remain liable on the contract No. 599”

(sic), he went on to say that:

“The court's view simply and briefly expressed is that T.S. 6146 and contract No. 599 were and are separate contracts, the former between plaintiff and defendant and the latter between defendant and Watkins Ltd. The former did not confer any rights or duties upon plaintiff vis-à-vis Watkins Ltd. nor did the latter confer any similar rights or duties upon Watkins Ltd. vis-à-vis plaintiff. The two contracts merely indicate that defendant first contracted with Watkins Ltd. and then contracted with plaintiff to enable it to fulfil this contract with Watkins Ltd.”

In this passage the learned magistrate seems not to have appreciated the true legal position with regard to undisclosed principals. In particular he seems to have overlooked the fact that when one contracts with a third party for an undisclosed principal one contracts with that party as an apparent principal and renders oneself primarily liable to him as principal, while at the same time, as between oneself and the undisclosed principal, whom one is screening from the third party, one enters that contract as agent of the undisclosed principal and can indemnify oneself and recover from the latter any sum that one has lawfully and reasonably spent in connection with the contract while acting within the scope of that agency. Such was the relationship established between the appellants and Watkins Ltd. on the one hand, and between the appellants and the respondent on the other hand, by the contract No. 559 (on the one hand) and by the memorandum of contract T.S. 6416 and the respondent's written acceptance of it (on the other hand). The legal position is clearly set out in s. 222, s. 230, para. (2), and s. 232 of the Indian Contract Act; and see, as regards the right of indemnity, Halsbury's Laws of England (3rd Edn.), Vol. 1, at pp. 203 et seq. And see *Hichens, Harrison, Woolston & Co. v. Jackson & Sons* (1), [1943] A.C. 266.

Another ground on which the learned trial magistrate held that the appellants were not entitled to an indemnity from the respondent, by way of set-off, in respect of the Shs. 11,011/58 which they had paid to Watkins Ltd. upon the arbitration award, was that, before the arbitration was held, the respondent wrote to the appellants, on October 17, 1959, repudiating, or purporting to repudiate, the claim of Watkins Ltd. against the appellants in respect of the coconuts, which later that month became the subject of the arbitration. This letter, which began—“Concerning our conversation of even date”, dealt with the coconut claim in the following words:

“Regarding the claim on fresh coconuts, this claim is not admitted to. Subject to legal advice negotiations might be entertained. My instructions to you are that nothing further is to be done concerning the fresh nut claim until written instructions are obtained from the undersigned.”

To this letter the appellants replied on October 19 in the following terms:

“As pointed out in our conversation I am making normal commercial retention of moneys due to you in respect of a claim which has arisen against shipment of coconuts made by you.

“Evidence at present indicates that unripe coconuts which did not comply with the contract or 5 per cent. tolerance as regards size were shipped.

“At present this claim can be settled for £529 11s. 7d.

“During our conversation it was made clear that we had sold as your agents on a contract providing for arbitration in London in the event of any dispute. This condition had been acknowledged by you.

“Our advice was that arbitration would probably be more expensive to yourself than to settle the claim at the figure quoted above.

“Failing your acceptance of the buyers claim he will no doubt ask for arbitration. As it is not possible for me to set a figure of the likely amount if the matter goes to arbitration, proceeds of coir are being held.

“I note in your letter that negotiations might be entered into. Please may I have your offer in settlement of this claim.”

The respondent sent no reply to this letter from the appellants for a whole month, either personally or through his advocates. Meanwhile the appellants, having failed to obtain from him a figure at which he would be prepared to settle the claim, were obliged to let the matter go to arbitration, as between themselves and Watkins Ltd., and on October 31 the arbitration was held. On November 12, 1959, the award was published. The respondent then instructed the appellants to appeal against the award, which they did, but unsuccessfully, the appeal being dismissed on November 24, 1959. The appellants then paid to Watkins Ltd. the amount awarded, with incidental costs.

On these facts the learned trial magistrate held that the appellants, in submitting the claim to arbitration and in paying on the award, were acting outside the scope of their agency in that they acted contrary to the express instructions of the respondent, and that they were accordingly not entitled to be indemnified by him for the amount so paid. I think, with respect, that the learned magistrate erred in so holding. The respondent had already ratified the contract No. 559 between the appellants (acting as apparent principals) and Watkins Ltd. for the supply of coconuts which Watkins Ltd. had paid for and which turned out to be bad; and Watkins Ltd. had already made their claim against the appellants in respect of those coconuts and the appellants had incurred liability. It was only a question of how the amount of that liability should be agreed, whether by settlement or by arbitration; and the contract so ratified by the respondent contained an express clause for the reference of disputes under it to arbitration. The appellants were thus authorised by the respondent to arbitrate. It was too late at this stage, when the appellants had already incurred liability on the contract, for the respondent to wash his hands of the whole matter, as he purported to do in his letter of October 17, 1959, by refusing to admit the claim and informing the appellants that they must make no payment on it unless and until instructed by him; or, to put the matter in a legally more accurate way, informing them in effect that if they did make such a payment without such instructions they would be considered as doing so outside the scope of their authority or agency and would accordingly forfeit their right to indemnity. For by this time the appellants were bound to settle or arbitrate with Watkins Ltd., who were not concerned with any limiting instructions given to the appellants by the respondent, of whose existence indeed they were unaware. And when the respondent failed to reply to the appellants' letter of October 19 asking them to name a figure at which he would be prepared to settle, they were bound to resort to the only alternative, namely to arbitration. Section 227 of the Indian Contract Act, it is true, provides as follows:

“227. When an agent does more than he is authorised to do, and when

the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.”

But s. 204 of the same Act makes the following provision:

“204. The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.”

And the following are the very pertinent general observations on the effect of such a purported revocation of authority upon an agent’s right to indemnity, in *Lindley on Partnership* (11th Edn.), at p. 458:

“The position of an agent who has already acted on his instructions, and has thereby incurred a legal obligation to third parties, is different. The better opinion is that in this case he is not bound on the command of his principal to stop short and refuse to perform the obligation incurred. There is no doubt that, as between himself and his principal, an agent is entitled to obey the counter order, and to obtain a full indemnity from the consequences of so doing. But it is apprehended that he is at liberty so far to carry out the instructions on which he has begun to act as may be necessary to relieve himself from all the legal liabilities incurred before notice of the countermand, and having done so, to insist upon indemnity and reimbursement as if the principal had not changed his instructions.”

See also, in support of this general principle, *Rhodes v. Fielder, Jones and Harrison* (2) (1920), 89 L.J.K.B. 15, at p. 16; and *Christoforides v. Terry* (3), [1924] A.C. 566, at p. 571.

I therefore hold that the appellants, in paying upon the award, were acting within the scope of their concealed agency, and that their right to be indemnified by the respondent to the extent of the sum so paid upon and in connection with the award was not forfeited by reason of any non-compliance with the directions contained in the respondent’s letter of October 17, or any similar instructions on his part.

I have already held, during the course of the hearing of this appeal, that the respondent, by reason of his not having pleaded it, is precluded from arguing that the appellants, between the making of the claim by Watkins Ltd. and the payment on the resulting award, acted negligently, or acted without keeping the respondent sufficiently informed of what was going on. There remains only one further point upon which argument was seriously submitted on behalf of the respondent. This submission concerns the right of the appellants to set-off, against the sum which they otherwise owed the respondent upon the general account between them, the amount paid out upon and in connection with the award. It is based on s. 217 of the Indian Contract Act, which provides as follows:

“217. An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.”

It is contended that the other moneys against which the appellants sought to set-off the sum in dispute, or in other words, out of which they sought to retain that sum, were not received “in the business of the agency”, in that they related to other transactions between the respondent and the appellants in the capacity of principal and agent respectively, and not to the particular transaction whose subject-matter was the coconuts in dispute, evidenced by the

contract note No. 559, the memorandum of contract T.S. 6416, and the respondent's confirmation of the latter. It is accordingly argued that the set-off falls outside s. 217 and is therefore not legally justified. I think that this contention, which the learned trial magistrate acceded to, gives too narrow an interpretation to the words "in the business of the agency" in s. 217. Where, as in the present case, the parties have a running account, concerned with a number of different transactions which the one party conducts as agent for the other, then I would hold that the "business of the agency" includes all those transactions which are the subject of the running account and which are conducted between them upon that relationship of principal and agent. In the present case the manager of the appellant company gave unchallenged evidence that the procedure, in overseas sales transactions conducted through the agency of the company, was that the company

"works on a commission basis—any loss is debited to client's account; this is made clear to a client before such relationship is begun and sales transacted".

The use of the word "sales" in the plural indicates clearly that the account was concerned with all current transactions between them on a principal and agent basis, and that there was not a separate account for each transaction. And later, this same witness, in referring to an item in the account annexed to the statement of defence for Shs. 28,423/40 which was concerned with another agency transaction between the two of them, and against which the appellants sought to set-off the disputed Shs. 11,011/58, said:

"First item Shs. 28,423/40 largely consisted of proceeds of coir fibre shipments. The coconut money [sc. the money paid by Watkins Ltd. to the appellants for the coconuts later found to be bad] is not included in this item because it had already been paid over to plaintiff. This had been paid over because there was a running account, and if debits subsequently had to be made they could easily be made out of moneys remaining in our hands."

This uncontradicted evidence makes it clear that the wider interpretation which I have placed on the words "the business of the agency" in s. 217 of the Indian Contract Act was in accord with the usual and agreed practice between the appellants and their clients, including the respondent in particular.

I accordingly hold that the appellants were entitled in law to set-off and debit the item of Shs. 11,011/58 in their account with the respondent.

For all the foregoing reasons the appeal is allowed, the judgment of the court below is set aside, and the plaintiff-respondent's suit is dismissed, with costs to the appellants here and below.

Appeal allowed.

For the appellants:

WD Fraser Murray

For the respondent:

RN Donaldson

For the appellant:

Advocates: *Fraser Murray, Thornton & Company*, Dar-es-Salaam

For the respondent:

Donaldson and Wood, Tanga

Ernest Henry Powell Mallinson v Flora Maclean Mallinson
[1961] 1 EA 185 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 25 January 1961
Case Number: 44/1960
Before: Sir Alastair Forbes V-P, Gould JA and Connell J
Appeal from: H.M. Supreme Court of Kenya–Farrell, J

[1] Divorce – Desertion – Husband employed away from matrimonial home – Refusal by wife to join husband – Whether refusal necessarily constitutes desertion – Burden of proof.

Editor’s Summary

In 1950 the appellant, a retired officer, and the respondent acquired and lived at the matrimonial home in Nanyuki. Later that year the appellant to supplement his pension sought and obtained temporary employment at a school at Gilgil. He remained there until 1954, returning to Nanyuki for holidays and later took a temporary position at Nyeri. In 1955 the appellant obtained a post as assistant master at a school at Gilgil on a four years contract from January, 1956. He then invited the respondent to join him at Gilgil and she refused. In 1959 the appellant petitioned for a divorce alleging that the respondent’s refusal to join him at Gilgil constituted desertion without just cause. The trial judge dismissed the petition, holding, *inter alia*, that he could find nothing in the evidence to suggest that the respondent was not ready and willing to have the appellant at the Nanyuki house during holidays; that there was no evidence after the original invitation of any further attempt by the appellant to persuade the respondent to join him at Gilgil; that it was to be inferred that after the respondent’s first refusal the appellant acquiesced in the respondent remaining at Nanyuki; that whilst the request was not unreasonable, the respondent might have considered that the request was not made very seriously, that in the circumstances the refusal by the respondent was not wholly unreasonable and therefore the refusal did not indicate any intention on the part of the respondent to desert the appellant. On appeal it was submitted *inter alia* that the trial judge erred in holding that the respondent’s refusal to join the appellant at Gilgil was not unreasonable and that she had no intention to desert, that he misdirected himself (*a*) by taking into account the alleged failure of the appellant to attempt to persuade the respondent to change her mind, and (*b*) in holding that if the respondent had been guilty of desertion, the appellant had acquiesced in her refusal by failing to try to persuade her to change her mind and that he failed to direct himself that once desertion had been proved to begin, a presumption would arise that nothing had happened to preclude the appellant from asserting that the respondent continued in a state of desertion. Counsel for the respondent conceded the last two grounds but contended that desertion had not begun.

Held –

- (i) the judge’s finding that the appellant acquiesced in the respondent’s refusal to join him could not be supported.

- (ii) the refusal of the respondent to join the appellant was unreasonable.
- (iii) however the burden of proof, which is heavier than in an ordinary civil action lay on the appellant and even after giving full weight to the appellant's invitation to the respondent to join him, the evidence fell short of establishing an animus deserendi on the part of the respondent.

Appeal dismissed.

Cases referred to:

- (1) *Dunn v. Dunn*, [1948] 2 All E.R. 822.
- (2) *Walter v. Walter* (1949), 65 T.L.R. (R.) 680.
- (3) *Harriman v. Harriman*, [1909] P. 123.
- (4) *Bartram v. Bartram*, [1949] 2 All E.R. 270.
- (5) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582.
- (6) *Hosegood v. Hosegood* (1950), 66 T.L.R. 735.

January 25. The following judgments were read:

Judgment

Sir Alastair Forbes V-P: This is an appeal from a judgment and decree of the Supreme Court of Kenya dismissing with costs a petition for dissolution of marriage by a husband (now the appellant) on the grounds of desertion. The petition is dated June 12, 1959, and alleges that the respondent deserted the appellant without just cause for a period of at least three years immediately preceding the presentation of the petition. The particular act relied on as constituting desertion was the alleged refusal of the respondent, in or about January, 1956, to join the appellant and live with him at Pembroke House School, Gilgil, where the appellant had obtained employment as assistant master for a period of four years. The petition alleges:

“Your petitioner requested the respondent to join him at Pembroke House School aforesaid yet she refused to do so and in the course of correspondence indicated her intention of bringing cohabitation between your petitioner and the respondent permanently to an end and has ever since January, 1956, without cause or the consent of the petitioner and with such intention, lived separate and apart from him.”

In her answer to the petition the respondent stated, *inter alia*:

- “6. That the respondent admits that she has since January, 1956, lived separate and apart from the petitioner but avers that this was due to the conduct of the petitioner who failed to provide any suitable accommodation for her where she could live and cohabit with him and further avers that she requested the petitioner to make available for her suitable accommodation where she could live and cohabit with him but the petitioner failed and has at all material times continued to fail to provide such accommodation for her as aforesaid. For the reasons aforesaid the respondent has been obliged to continue to live in the matrimonial home at Nanyuki in the said Colony no other home or accommodation being available or having been provided for her by the petitioner.
- “7. That the respondent now is and has at all material times been ready and willing to live and cohabit with the petitioner provided that suitable accommodation is made available for her by the petitioner.”

The facts leading up to the alleged desertion are fully stated in the judgment of the learned trial judge. For the purposes of this appeal it is sufficient to say that the parties, who are both elderly, were married in India in the year 1928, and that the three children of the marriage are all of age; that the appellant retired from the Indian Army in 1947, and in or about 1948 the parties decided to make their home in Kenya; that about 1950 a house at Nanyuki was purchased in the joint names of the appellant and respondent; that of necessity the appellant had to seek employment to supplement his army pension, and

obtained employment in 1950 as an assistant master at Pembroke House School, Gilgil, on a temporary basis, and remained there till 1954; that during this time he could and did return to the house at Nanyuki,

which was then the matrimonial home, only during the school holidays; that during this period the emergency broke out in consequence of which the respondent suffered considerable strain which had an adverse effect upon her, and made her anxious that the appellant should return to the Nanyuki home; that the appellant was unable to obtain work in the Nanyuki area, but did for a time obtain a temporary post at Nyeri, where he remained till the end of the year 1954; that in 1955 he accepted a post as assistant master at Greensteads School, Nakuru, at a salary of £25 or £30 per month more than he was receiving at Nyeri, and remained there till the end of the year 1955; that thereafter he was offered and accepted a post as assistant master at Pembroke House School, Gilgil, on contract terms for a period of four years from January, 1956; and that during the period 1950 to 1955 relations between the appellant and respondent deteriorated steadily, letters written by the respondent to the appellant, some of which were exhibits, being abusive in tone and far from calculated to make the appellant feel that he was welcome in his own home.

So far the facts were not in dispute. There was a conflict, however, as to the events connected with the alleged invitation by the appellant to the respondent to join him at Gilgil after he had secured the four-year post. As to these, the learned judge accepted the respondent's version as to the sequence of events, holding that the appellant and Mr. Hazard, Headmaster of Pembroke House School, must be mistaken; but as to the events themselves, he accepted the evidence of the appellant and Mr. Hazard, concluding that the respondent was untruthful as to these. It is the events themselves which matter, the precise times having little significance. The learned judge said:

"More important, however, than any question as to dates is the question whether an offer was made to the respondent of a residence at Pembroke House, to be available to her from January, 1956, onwards. On this point there is a clear conflict of evidence between the petitioner and the respondent. If the respondent is to be believed, she herself suggested that she should come to live in the cottage which she had seen and was then told that it was not available. According to the petitioner, he urged her to come and live with him there and she refused to do so 'at any price'. I have found nothing in the correspondence to help me to resolve this conflict. The evidence of Mr. Hazard is clear that the cottage was in fact available, and I find it difficult to believe that the petitioner deliberately misled the respondent by telling her that it was not available. I find it difficult, too, to believe that the respondent is deliberately lying when she says that the petitioner so informed her, but I have reluctantly come to the conclusion that the respondent is not telling the truth about this, and that the petitioner is speaking the truth when he says that the cottage was in fact available and that the respondent was so informed. I accordingly find that the petitioner did offer the respondent a home at Gilgil which it is agreed was or could have been made suitable, to be available in January, 1956, and asked the respondent to join him there and that the respondent refused to do so. It is on that refusal that the charge of desertion is based."

These findings of fact by the learned trial judge are not challenged. The learned judge then proceeds to consider the law and concludes, relying on *Dunn v. Dunn* (1), [1948] 2 All E.R. 822 and *Walter v. Walter* (2) (1949), 65 T.L.R. (R.) 680, that:

"the mere refusal of the wife to join the husband in the place where he is ready to receive her is not necessarily desertion unless the refusal is in the circumstances unreasonable."

He accordingly proceeds to consider this question, and the question whether the respondent's refusal indicated an intention to desert. As the learned judge's

conclusions on these aspects of the matter are challenged, it is necessary to set out the relevant part of the judgment in full. It is as follows:

“In this case the respondent’s refusal to join her husband at Gilgil must be looked at against the background of the history of the marriage during the immediately preceding years. The parties had come to Kenya with the intention of setting up a home there for themselves and their two daughters, and since the purchase of the house at Nanyuki in 1950 that had unquestionably been the matrimonial home. The daughters had subsequently taken up employment away from home, but used to return there for holidays and at any rate to the respondent it was important that there should be a home to which they could return. The respondent had lived there throughout, often in most unpleasant circumstances. The petitioner, rightly or wrongly, had taken up employment away from home, but used to return there in his holidays, and right up to 1956 at any rate, it was his home as well as hers, though towards the end of the period his visits tended to become shorter and more infrequent. Though the petitioner had obtained employment at Gilgil on a contract for at least four years, to the respondent there was a permanency about the home at Nanyuki which may well have appeared to be lacking in the proposed new home at Gilgil. That in itself is not a ground for refusing any change, but it is an element to be considered, as it was in *Dunn v. Dunn*, and while complaints were made by the petitioner that when from time to time he returned the respondent made him unwelcome in various ways. I find nothing in the evidence to suggest that she was not ready and willing to have the petitioner there during his holidays whenever he could get them, as was found to be the case with the respondent in *Dunn v. Dunn* (supra).

“To constitute desertion there must not only be *de facto* separation, but an *animus deserendi*. So far as the respondent was concerned, her refusal to go to live at Gilgil would not have put an end to the marriage as it had existed for the last six years, when her husband had been working away from home, but would have left the existing state of affairs unchanged, with the matrimonial home still in existence and available to both the parties as it had been in the past. In those circumstances it is difficult to argue that the respondent was showing an intention to desert her husband, as she would have done if she had refused to live in the only place which could have been regarded in the future as a matrimonial home. Since the war the petitioner had found five different employments, all of which required him to live away from home. During the early days of the emergency the respondent had urged him to come back and live with her at Nanyuki, and while it has not been shown to my satisfaction that any particular job had been offered to him in that area, I formed the impression that the petitioner had not shown any great enthusiasm to find a job there. Whether that is right or wrong, I think the respondent had reason to believe that the petitioner had no great desire to live at home with her. I have already referred to the question whether when he was employed at Greensteads he invited the respondent to join him there; and whether he did so or not, it is clear on the evidence, that he did not press the respondent to do so. Then towards the end of 1955 he asked her to join him at Pembroke House. In view of his previous attitude it is material to consider the degree of urgency with which his invitation was given. There is all the difference between a casual suggestion that it would be a good idea if the respondent came to join him, and an insistent request that she should do so, coupled with some clear intimation that her failure to do so might put an end to their marriage.

“The evidence of the petitioner which I have already discussed refers

to two requests, (a) by letter, to which his daughter replied saying that the respondent did not wish to come, and (b) orally, at the time of her visit to Pembroke House. As I have accepted that the respondent is correct in placing her visit in September, 1955, it follows that the first request must have been in discussion at that time, and that the letter to his daughter must have been later. The daughter's evidence is that the letter (if it is the same letter) referred specifically to a job being available for the respondent. This could, of course, imply that the respondent should come and reside at the school. But even if the letter can be construed as a further request to the respondent to come and live there, it is a strange way to make such a request, by means of a letter to the daughter.

"In an advocate's letter to the respondent's advocates dated September 24, 1957 (exhibit 2, No. 7), it is stated that the petitioner

'made several subsequent attempts to persuade her to join him'.

"When asked about these subsequent attempts, the petitioner said they were made direct or through his daughter. One made through his daughter has been mentioned. I have now to see what evidence there is of any direct attempts. No evidence has been given of any other oral requests and it is accordingly necessary to look at the correspondence. In this connection it must be borne in mind that not all the correspondence is before the court.

"On May 29, 1956, the respondent writes primarily about the petitioner's proposed visit to England, and incidentally mentioning repairs required to the house at Nanyuki. The petitioner in his reply (exhibit 1, No. 5) refers briefly to the question of repairs, but is silent as to any suggestion that the house should be given up, and that the respondent should come to live at Gilgil.

"In a letter dated July 6, 1956, the respondent begs the petitioner to forego his trip to England and to try to keep a home together for the girls; and on the same date a letter is sent by her then advocates demanding that necessary repairs should be done to the house and that the petitioner should forego his trip (exhibit 2, No. 1). The reply from the petitioner's advocates (exhibit 2, No. 2) is silent as to any alleged desertion by the respondent, and contains no request that she should come to Gilgil. In a letter of October 12, 1956, the petitioner complains that the respondent has left the Nanyuki house (a point not without significance) and gone to join her daughter in Tanganyika for some months. The letter asks about the respondent's future plans, but contains no further suggestion that she should come to Gilgil. The reply (exhibit 1, No. 9) stresses the need to provide a home for the two daughters, and suggests selling the Nanyuki house and buying one in Nairobi. The letter does not indicate that the writer is conscious of any pressure by the petitioner for her to join him at Gilgil. In all the correspondence so far mentioned the proposal that she should do so appears to have been forgotten.

"On June 2, 1957, the petitioner writes (exhibit 1, No. 10) saying it is five months since the respondent left the Nanyuki house for Tanganyika and asking whether she wishes 'to return and resume our married life'. The natural interpretation of this letter is that the petitioner wishes her to return to Nanyuki. It is difficult to read into it any suggestion that she should come to Gilgil. There follow a number of other letters and it is not until the advocate's letter of September 24, 1957, that any suggestion is made that the respondent is in desertion by reason of her refusal to live with the petitioner at Gilgil.

"The respondent for her part says that since the petitioner went to live at Pembroke House, nothing has been said about any accommodation for her at Gilgil. The petitioner's explanation is that he would have found

accommodation if she had offered to come. But apart from the one letter to his daughter, there is nothing in the correspondence or the evidence of the petitioner which indicates that any further attempt was made to persuade the respondent to join him after the original invitation, and the inference I draw from the evidence as a whole is that the petitioner after the respondent's first refusal acquiesced in her remaining at Nanyuki.

"On a consideration of all the evidence, both oral and in correspondence, I find that in September, 1955, a request was made to the respondent to join the petitioner at Gilgil in January, 1956: that the request was made without previous discussion, the possibility only recently having arisen; and that there is no sufficient evidence that the request was ever repeated, either between September, 1955, and January, 1956, or afterwards until the advocate's letter of September 24, 1957: and that from this failure to follow up the matter it may be inferred that the request was not in the first place put forward with any strong degree of insistence. The request was not in itself unreasonable: but neither in my view was the refusal in the circumstances wholly unreasonable. The petitioner had been content to live apart from the respondent for a number of years, and there is no suggestion that the respondent was in desertion before January, 1956, when the respondent was living in the matrimonial home at Nanyuki. Before agreeing to the petitioner's request the respondent would in the circumstances reasonably require to be satisfied that the petitioner genuinely desired her to come and live with him at Gilgil, and in the absence of any insistence on his part or any renewal of the request it may well have appeared to her that the request was not one which he put forward very seriously. Her refusal does not appear to me in the circumstances to indicate any intention to desert and without such intention there can be no desertion. Even if the refusal did constitute desertion at that moment, I find that the petitioner acquiesced in her refusal by his failure to attempt to persuade her to change her mind, and consent by the other spouse puts an end to desertion. The onus is on the petitioner to show desertion without cause for a period of three years immediately preceding the presentation of the petition, and I find that the petitioner has not discharged that onus."

The grounds of appeal are as follows:

- "1. The learned trial judge erred in holding that the refusal of the respondent to join the appellant at Gilgil was not unreasonable and that there was no intention to desert on her part.
- "2. The learned trial judge misdirected himself on the facts when considering the issue whether the refusal of the respondent as aforesaid constituted desertion, in taking into account the alleged failure of the appellant to attempt to persuade the respondent to change her mind.
- "3. The learned trial judge failed to direct himself adequately as to the effect of the letters written by the respondent to the appellant in 1955 and 1956 on her intention to desert and the unreasonableness of her refusal to join the appellant at Gilgil.
- "4. The learned trial judge misdirected himself in law and on the facts in holding that if the respondent by her refusal as aforesaid had been guilty of desertion, the appellant had acquiesced in the respondent's refusal by his failure to attempt to persuade her to change her mind and thereby put an end to the desertion.
- "5. The learned trial judge erred in law in failing to direct himself that once desertion had been proved to begin, a presumption would arise that nothing had happened to preclude the appellant from asserting that the respondent continued in a state of desertion."

So far as grounds 4 and 5 are concerned, I think, with the greatest respect

to the learned judge, that they are well founded. In *Latey on Divorce* (14th Edn.) at p. 132 it is stated:

“Passive acquiescence by one spouse in a state of abandonment forced on him or her by the other spouse does not terminate the desertion . . . The intention to desert is presumed to continue unless the deserter proves genuine repentance and reasonable attempts to get the other spouse back.”

In *Harriman v. Harriman* (3), [1909] P. 123 at p. 148, in a passage which is cited in *Latey*, Buckley, L.J., said:

“Desertion does not necessarily involve that the wife desires her husband to remain with her. She may be thankful that he has gone, but he may, nevertheless, have deserted her.”

In *Bartram v. Bartram* (4), [1949] 2 All E.R. 270 at p. 272, Bucknill, L.J., said:

“ . . . it seems to me that the husband is entitled to say that the desertion once established continues until it is proved that it has been brought to an end.”

And at p. 273, Denning, L.J., said:

“Once the period of desertion has begun to run, it does not cease to run simply because the parties attempt a reconciliation and for that purpose come together again for a time. That was laid down by Lord Merriman, P., in *Mummery v. Mummery*, [1942] 1 All E.R. 553 and has never been doubted since. Indeed, I would say in such a case the period of desertion does not cease to run unless, and until, a true reconciliation has been effected, as to which see *Mackrell v. Mackrell*, [1948] 2 All E.R. 858. Any other view would greatly hamper attempts at reconciliation, because it would mean that the deserted party would be disinclined to take the other back for fear of losing his legal rights in case the reconciliation was unsuccessful.”

I think there is no doubt on the authorities that the principles are correctly stated in *Latey*, and the learned judge’s finding that:

“Even if the refusal did constitute desertion at that moment, I find that the petitioner acquiesced in her refusal by his failure to attempt to persuade her to change her mind, and consent by the other spouse puts an end to desertion”

cannot be supported.

Counsel for the respondent, in effect, conceded that he could not contest grounds 4 and 5 of the memorandum of appeal, but he submitted that the decision challenged in ground 4 was obiter and not material to the decision, and that ground 5 did not arise as the learned judge had held that desertion did not begin. The decision challenged in these grounds would, of course, be material if the court were to hold that the learned judge was wrong in holding that desertion had not begun, but, as I understand it, counsel for the respondent relied solely upon the learned judge’s finding that desertion did not begin.

The question whether or not the respondent’s refusal to join the petitioner at Gilgil did constitute an act of desertion on the part of the respondent was, of course, the principal issue before the Supreme Court; and the appellant can only succeed if he can satisfy this court that it ought to interfere with the learned judge’s conclusion on that issue. That conclusion, which is challenged in grounds 1, 2 and 3 of the memorandum of appeal, is largely a conclusion of fact, though ground 2 involves the application of the same legal principles as are referred to in grounds 4 and 5.

The principles upon which an appellate court will interfere with a finding of fact by a trial judge were stated by Viscount Simon in *Watt (or Thomas) v. Thomas* (5), [1947] 1 All E.R. 582 as follows at p. 583:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (e.g., on a case stated or on an appeal under the County Court Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given. . . . I agree . . . that the true rule is . . . that a court of appeal should ‘attach the greatest weight to the opinion of the judge who saw the witnesses and heard their evidence’, and, consequently should not disturb a judgment of fact unless they are satisfied that it is unsound. It not infrequently happens that a preference for A.’s evidence over the contrasted evidence of B. is due to inferences from other conclusions reached in the judge’s mind rather than from an unfavourable view of B.’s veracity as such. In such cases it is legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them, if the materials admit of this, and, if the appellate tribunal is convinced that these inferences are erroneous and that the rejection of B.’s evidence was due to the error, it will be justified in taking a different view of the value of B.’s evidence. I would only add that the decision of an appellate court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and circumstances of the case under consideration.”

It must further be borne in mind that the burden was on the appellant to prove beyond reasonable doubt that the respondent deserted him. As to this legal burden of proof, Denning, L.J., said in *Dunn v. Dunn* (1), at p. 823:

“The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal; and, indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has the husband proved that she deserted him without cause?”

I think the learned judge’s essential findings of fact in the instant case may be summarised as follows:

- (1) That the appellant did offer the respondent a home at Gilgil which was or could have been made available in January, 1956, asked the respondent to join him there, and the respondent refused to do so.
- (2) That the respondent did not tell the truth about this offer.
- (3) That he (the learned judge) could find nothing in the evidence to suggest that the respondent was not ready and willing to have the appellant at the Nanyuki house during his holidays.
- (4) That there is no evidence of any further attempt by the appellant, after the original invitation, to persuade the respondent to join him at Gilgil.
- (5) That it is to be inferred from the evidence that after the respondent's first refusal the appellant acquiesced in the respondent remaining at Nanyuki.
- (6) That from the failure to follow up the matter it is to be inferred that the request was not in the first place put forward with any strong degree of insistence.
- (7) That the request was not in itself unreasonable.
- (8) That in the absence of any insistence on the part of the appellant or any renewal of the request, it may well have appeared to the respondent that the request was not put forward very seriously.
- (9) That in the circumstances the refusal by the respondent was not wholly unreasonable.
- (10) And that therefore the refusal did not indicate any intention on the part of the respondent to desert the appellant.

It is to be noted that, apart from findings Nos. (1) and (2), which are not challenged, none of the findings set out above are based on the credibility of the witnesses, but are, in most cases, inferences drawn from specific facts referred to by the learned judge. The only finding depending on the veracity of the parties is adverse to the respondent. It is legitimate for this court to examine the grounds for the inferences drawn by the learned judge (*Watt v. Thomas* (5)).

Counsel for the appellant has, in effect, challenged the findings numbered (3), (4), (5), (6), (8), (9) and (10).

As to finding No. (3), that is, that there is no evidence to suggest that the respondent was not ready and willing to have the appellant at the Nanyuki house during the school holidays, counsel for the appellant submitted that this amounted to a serious misdirection in that the learned judge ignored the appellant's own evidence, and ignored or did not appreciate the force of the correspondence which was exhibited in the case. With respect, I think there is force in counsel's submission. The appellant in the course of his evidence said:

"I remained at Pembroke House School for three to four years. My home was still at Nanyuki, and I used to return there in the holidays. My relations with my wife gradually deteriorated. I did not seem to be welcome at home. On returning I used to find my room full of boxes. . . . Conversation deteriorated. My wife did not refuse to accompany me out. She rarely cooked for me . . . Relations went from bad to worse . . . I returned to Nanyuki in the holidays at Easter, 1956. I gave my wife the letter which appears as No. 3 in exhibit 1. She asked me to give it to her as she might wish to go and live elsewhere. Our relations at that time were very bad. We hardly ever spoke and used to go walks on our own. She rarely appeared at meals . . . I tried to discuss things without success."

As to the correspondence, the learned judge himself in another part of his judgment said:

“A letter written by [the respondent] in August, 1954, is certainly not calculated to make the petitioner feel that he is welcome in his own home or regarded by his wife with any strong degree of affection, and subsequent letters in the agreed bundle do nothing to alter this impression.”

This, as it seems to me, is undoubtedly evidence from which it could be inferred that the respondent was not “ready and willing” to have the appellant at Nanyuki in the sense of not making him welcome in the house there. The respondent had stated in her evidence:

“In my holidays I and M. got on all right. I was generally busy . . . There was no trouble about providing meals except that I was very busy.”

It may be that the learned judge was not prepared to accept the appellant’s evidence on this point, but he does not put the matter on this basis. I think that the passage complained of does amount to a misdirection, and that it is open to this court to reach its own conclusion on the evidence. In view of the tone of the respondent’s letters I have little hesitation in accepting the appellant’s evidence to the effect that he was not made welcome by the respondent at Nanyuki. Nevertheless it has not been suggested that the respondent’s conduct at Nanyuki was such as to amount to constructive desertion.

So far as findings Nos. (4), (5), (6), (8) and (9) are concerned, counsel for the appellant argued that the learned judge was wrong in law in taking into account the question of the lack of subsequent attempts by the appellant to get the respondent to join him at Gilgil; that the refusal to join the appellant in Gilgil in January, 1956, either constituted an act of desertion or it did not, and that the subsequent acts of the parties could not affect the nature of that act; that if the refusal did constitute an act of desertion the appellant was under no obligation to continue to press the respondent to join him and there was a presumption that the respondent continued in a state of desertion; and that the fact that the appellant did not subsequently press the respondent to join him could have no bearing on whether or not the request at the time it was put forward appeared a serious one and so could not be a basis for finding that the respondent’s refusal was “not wholly unreasonable”.

I have already dealt with some of these submissions in relation to grounds 4 and 5 of the memorandum of appeal. To cite again the passage from *Latey on Divorce* (14th Edn.) p. 132 which is set out above:

“Passive acquiescence by one spouse in a state of abandonment forced on him or her by the other spouse does not terminate desertion . . . The intention to desert is presumed to continue unless the deserter proves genuine repentance and reasonable attempts to get the other spouse back.”

I would further agree with counsel for the appellant that the absence of subsequent attempts to persuade the respondent to come to Gilgil of necessity could not affect the impression which the request made had upon the respondent at the time it was made. Nevertheless, I think the learned judge was entitled to consider the subsequent conduct of the appellant as evidence which might give some indication of the degree of insistence with which the appellant’s request had been made. But it would also be material to this aspect of the matter to take into account the respondent’s previous attitude towards the appellant, the fact that the cottage at Gilgil was allocated to someone else when the respondent refused to come there, and the appellant’s evidence that he did go to the Nanyuki house at Easter, 1956, and tried unsuccessfully to discuss matters with the respondent. These are factors which the learned judge

does not appear to have taken into account. It appears to me that these factors are sufficient to account for the absence of further requests being pressed by the appellant, and negative any inference which might be drawn from the absence of such requests.

It follows from what I have said that, with the greatest respect, I think that the learned judge's conclusion numbered (10) above is not founded upon sound grounds. This, however, is not the end of the matter. Although this court may be satisfied that the grounds on which the learned judge relied were erroneous, yet before the court can reverse the learned judge's decision it must be satisfied that on the evidence as a whole the appellant discharged the legal burden of proof that was upon him and established beyond reasonable doubt that the respondent did desert him in January, 1956.

It was common ground, and was, indeed, accepted by the learned judge, that the present state of the law as to where the matrimonial home should be is as stated by Denning, L.J., in *Dunn v. Dunn* (1). In that case Denning, L.J., said:

"I want to say a word also on the proposition that a husband has the right to say where the home should be, for, indeed, it is the same fallacy in another form. If that were a proposition of law it would put a legal burden on the wife to justify her refusal, but it is not a proposition of law and I am sure Henn Collins, J., in *Mansey v. Mansey* [1940] 2 All E.R. 424, did not intend it as such. It is simply a proposition of ordinary good sense arising from the fact that the husband is usually the wage-earner and has to live near his work. It is not a proposition which applies in all cases. The decision where the home should be is a decision which affects both the parties and their children. It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over the other. Each is entitled to an equal voice in the ordering of the affairs which are their common concern. Neither has a casting vote, though, to be sure, they should try so to arrange their affairs that they spend their time together as a family and not apart. If such an arrangement is frustrated by the unreasonableness of one or the other, and this leads to a separation between them, then the party who has produced the separation by reason of his or her unreasonable behaviour is guilty of desertion. The situations which may arise are so various that I think it unwise to attempt any more precise test than that of unreasonableness."

Although commenting that the circumstances of two cases are never the same, the learned judge appeared to find a parallel between the facts in the instant case and those in *Dunn v. Dunn* (1). I think, however, that there are important distinctions between the facts of the two cases, and I will refer to these later. The learned judge also referred to *Walter v. Walter* (2), and, I think, placed some reliance on the decision in that case, which is stated in the headnote (set out by the learned judge in his judgment) as follows:

"Held, applying *Dunn v. Dunn* that in the circumstances neither party was in desertion, for the law recognised—and nowhere more than in relation to questions of desertion—that marriage was an institution which depended on give and take on the part of both spouses, and in the present case both parties had been obstinate, each refusing to see the other's point of view, and each being prepared to see the marriage founder rather than give way."

Unfortunately the learned judge's attention does not appear to have been drawn to *Hosegood v. Hosegood* (6) (1950), 66 T.L.R. (R.) 735, where the decision in *Walter v. Walter* (2), was disapproved. In *Hosegood v. Hosegood* (6), Denning, L.J., said at p. 739:

“I am not going to assert that the husband had a legal right to require his wife to come to Salisbury: he had nothing of the kind. These matters, as I said in *Dunn v. Dunn* (64 The Times L.R. 570, at p. 572: (1949) P. 98, at p. 103) are to be settled ‘by agreement, by give and take, and not by the imposition of the will of the one over that of the other’. I repeat what I said there, that ‘neither has a casting vote, though to be sure they should try so to arrange their affairs that they spend their time together as a family and not apart’. If such an arrangement, however, is frustrated by the unreasonableness of one or the other, as if one party unreasonably refuses to join in a home reasonably proposed by the other, he or she may well be presumed to intend to bring the married life to an end and thus be found guilty of desertion. Only the other day we had a case where a husband unreasonably refused to set up a home for his wife away from his own mother when he could and should have done so. If he persisted in his refusal, it would be obvious that the married life would come to an end, and he might then be presumed to intend it.

“The only qualification which I would make to what I said in *Dunn v. Dunn* (supra) is that there are cases where each party is reasonable from his own point of view but is unreasonable in not giving proper weight to the other’s point of view. After all is said and done, the question—where the home should be—must be settled one way or the other: one or other must give way. If each sticks obstinately to his own point of view, and hence the marriage comes to an end, then, however reasonable the point of view of each originally, the point may well be reached when each is unreasonable in not giving way to the other and each may be guilty of desertion. Each must know full well that, if he or she does not give way, the married life will be brought to an end; and if each unreasonably persists each may well be presumed to intend to bring it to an end. I see no reason why the court should be forced to choose between them and say that one only is a deserter: both may be. In such cases, where more than three years have elapsed, the proper relief may be a decree of divorce without drawing any distinction between them. I say this because I am afraid that the last seven lines of my judgment in *Dunn v. Dunn* (supra) misled Mr. Justice Willmer in *Walter v. Walter* (1949) 65 The Times L.R. 680 into thinking that where each is obstinate neither is guilty of desertion; whereas the truth is that both may be.”

I think this makes it clear that what may be reasonable from the point of view of one party may not be reasonable from the point of view of the marriage as a whole, an aspect which the learned judge did not consider when he held that the respondent’s refusal was not “wholly unreasonable”.

As the learned judge rightly held, to constitute desertion there must not only be de facto separation, but an animus deserendi, and the question is whether the evidence establishes this. It appears to me that the appellant’s request for the respondent to join him at Gilgil is to be taken more seriously than the learned judge seemed to think. The learned judge appears to regard it as

“a casual suggestion that it would be a good idea if the respondent came to join him”,

an isolated request “not in the first place put forward with any strong degree of insistence”. The learned judge relies for this conclusion upon the respondent’s failure to follow up the matter, but I think the factors I have already indicated are sufficient to explain this failure. Apart from this, the evidence indicates, not merely a casual request, but some considerable discussions on the subject. Mr. Hazard’s evidence, which I can see no reason to reject on this point, is to the effect that he had discussions with the appellant and the respondent as to

whether she would come to occupy the vacant cottage and “it was made clear to her that it was available if she wanted it”. That there were discussions on this subject receives confirmation from the passage in the respondent’s letter of December 3, 1955, where she says:

“Mrs. Hazard had every right to talk matters over with me about your return to P.H. . . . and the chance of me living in the cottage”.

Further, it appears from Mr. Hazard’s evidence that there were at the same time discussions about the possibility of the respondent taking on a teaching job at Pembroke House. It appears to me upon this evidence that the appellant’s request to the respondent was far from a casual request, but was one which was discussed, not only between the parties, but with Mr. and Mrs. Hazard and included discussions on aspects of her coming to Gilgil such as the possibility of obtaining employment there. I do not think that the request is to be treated as a mere casual suggestion.

I have remarked that the learned judge appeared to find some parallel between the facts in *Dunn v. Dunn* (1), and this case. After briefly stating the facts in *Dunn v. Dunn* (1), he sets out the following passage from the judgment of Denning, L.J.:

“The decisive matter, to my mind, is that throughout the matrimonial home was at Morpeth and the wife was ready and willing to have him there on his leave whenever he could get there, and that is where the family were.”

Later, the learned judge says:

“Though the petitioner had obtained employment at Gilgil on a contract for at least four years, to the respondent there was a permanency about the home at Nanyuki which may well have appeared to be lacking in the proposed new home at Gilgil. That in itself is not a ground for refusing any change, but it is an element to be considered, as it was in *Dunn v. Dunn*, and while complaints were made by the petitioner that when from time to time he returned the respondent made him unwelcome in various ways, I find nothing in the evidence to suggest that she was not ready and willing to have the petitioner there during his holidays whenever he could get them, as was found to be the case with the respondent in *Dunn v. Dunn* (supra).”

As it seems to me, however, the circumstances in this case are altogether different. I have already discussed and disagreed with the learned judge’s remark that there was nothing in the evidence to suggest that the respondent was not ready and willing to have the appellant at the Nanyuki home during the holidays. Apart from that, the relevant facts in *Dunn v Dunn* (1), are stated by denning, L.J., as follows:

“She [i.e. the wife] was living with the two children, aged fourteen and seven, in the matrimonial home at Morpeth. She had never been away from Morpeth except for a few days in 1934. The husband wanted to uproot them for a stay in wartime at Immingham or Barrow. The stay was to be of uncertain duration and it might be for a few weeks or a few months. It was to be in rooms. The wife was deaf and had difficulty in making herself understood by strangers. . . . Her refusal to go for a short stay elsewhere in the circumstances which I have mentioned, it seems to me, was not unreasonable.”

In the instant case it is true the matrimonial home had been in Nanyuki for a number of years, but there the parallel between the two cases ceases. In the instant case the children of the marriage were of age and employed away from home. There was no question of a mere temporary stay in rooms, but a proposal

that the respondent join the appellant in a suitable house at the scene of his work for a substantial period, four years. The house in Nanyuki could have been let. There can be no doubt that the request was, as the learned judge held, reasonable. It may be that the respondent was reluctant to leave the house in Nanyuki, but, from the point of view of the marriage, I can see very little to justify the refusal. I would hold that the refusal was unreasonable, and not merely “not wholly unreasonable” as the learned judge held.

Even so, however, and though the respondent’s unreasonable refusal to join the appellant is, as Denning, L.J., said in *Dunn v. Dunn* (1) a factor of great weight, it is not, I think, in the circumstances of this case conclusive. There was still the house in Nanyuki to which the appellant could go in the holidays, and the refusal of the respondent to go to Gilgil need not have been accompanied by the necessary animus deserendi on her part. To establish the animus deserendi the appellant relies on the tone of the respondent’s letters. I have already discussed these and concluded that they support the appellant’s evidence that he was not welcome at the house in Nanyuki. But this does not necessarily mean that the respondent had already, prior to January, 1956, determined to bring the matrimonial consortium to an end. As I have said, it has not been suggested that her conduct amounted to constructive desertion. Relations between the parties at that stage may have been strained, but I find it difficult to say on the evidence that there had been a break between them. And, if there had not been a break, it is difficult to infer an appreciation on the part of the respondent that the appellant would not continue as before to treat the Nanyuki house as the matrimonial home. It is to be noted that in fact the appellant did return to the Nanyuki house in April, 1956. The mere intention to continue the existing state of affairs, unpleasant as they may have been, hardly suffices to establish an animus deserendi on the part of the respondent. I think that before an animus deserendi can be inferred there must be evidence to indicate that the respondent realised that by her refusal to go to Gilgil she would be putting an end to the matrimonial consortium. The learned judge, correctly in my view, appreciated this, though, as I have indicated above, I think he underestimated the force of the invitation to the respondent to join the appellant at Gilgil, partly, at least, on grounds which I do not think should legitimately be considered. Nevertheless, allowing full weight to that invitation, I still feel that the evidence falls short of establishing an animus deserendi on the part of the respondent when she refused the invitation. I have reached this conclusion with considerable hesitation as I think the tone of the correspondence does go some way towards showing that the respondent did not intend to resume normal matrimonial relations and that she was insincere in her requests to the appellant to give up his work and return to Nanyuki permanently. However, the burden of proof lies on the appellant, and it is a heavier burden than that which lies on a party to an ordinary civil action. I do not think the evidence he has led suffices to discharge this burden.

It follows that I think the appeal should be dismissed with costs.

Gould JA: I have had the advantage of reading the judgment of the learned Vice-President. Like him, I find the case one of doubt and difficulty and for the very reason that I am left in doubt I must find that the appellant has not discharged the onus of proving either the factum of separation in the true sense or the animus deserendi. The case turns entirely upon whether the refusal of the respondent in the latter part of 1955 to take up residence at Gilgil at the beginning of 1956, was an act of desertion accompanied by the necessary animus and (if so) whether the respondent’s state of being in desertion continued. As to the second of those conditions, I would have no hesitation in saying that if she was in desertion, there is nothing in the oral evidence or correspondence which would lead me to the opinion that the respondent had made any genuine offer to return. As to the letter of December 29, 1957, I agree with the opinion

of the learned trial judge when he said “I should have been slow to accept that letter as a genuine offer to return”.

It is the first question, i.e. whether the respondent was ever in the position of having deserted her spouse, that I have found difficult. It is unnecessary again to detail the circumstances, which have already been set out in full in the judgment of the learned Vice-President, but they leave me in doubt whether the respondent’s refusal to go to Gilgil was unreasonable. Certainly it would appear that such a move might have relieved the anxieties attendant upon her living alone at Nanyuki in the conditions of the emergency. On the other hand, the Nanyuki house had been established with the purpose of making it the matrimonial home, and the respondent was contributing to the joint income by running a nursery school there. I do not think that this one specific refusal was sufficient to show an animus deserendi in the circumstances. Nor am I satisfied that the respondent’s subsequent conduct towards the petitioner, when he visited her for the vacation in 1956, supplied evidence sufficient to show that that refusal to go to Gilgil was combined with the intention of bringing cohabitation permanently to an end. There is conflict between the evidence of the parties as to what took place, and no finding of fact by the learned trial judge on the question. The evidence indicates at least that the appellant was not made very welcome, but it has never been suggested (nor could it be on the evidence as recorded), that the respondent’s treatment of the appellant at that time would have sustained a plea of constructive desertion. Something less might perhaps be sufficient, coupled with the refusal to go to Gilgil, to supply evidence of an animus deserendi but the evidence recorded does not satisfy me that such an animus was present. Nor does anything in the correspondence, unrestrained and abusive though it was on the part of the respondent, in my opinion, adequately supply proof of an intention to desert, at the time of the Gilgil affair.

There is another aspect of the matter to which I would refer. At the end of 1955, the parties had already, in one sense, been living apart for a number of years. The appellant had been returning to the matrimonial home for his holidays, and the parties were not “separated” in the matrimonial sense of that word. Nevertheless they had by mutual consent (perhaps a reluctant one on the part of the respondent) adopted a mode of living which entailed their residing for the greater part of the time in different places in the territory. In my opinion the evidence adduced by the appellant was insufficient to prove that he did, because of the respondent’s refusal to join him in Gilgil, withdraw his consent from the continuance of the mode of life which had been consensually adopted. It is clear law that if the party alleged to be in desertion left the other with that party’s consent, that is no desertion. The question of consent in this connection is not the same as that of acquiescence in a definite state of desertion; such acquiescence does not negative the desertion. But no desertion would arise at all, where two parties had agreed upon a certain mode of life involving partial de facto separation, and one of them, being asked to take up permanent residence with the other, stated that he or she preferred to continue the existing arrangement, if the other party did not withdraw his consent to that arrangement. The appellant and the respondent had such an arrangement in the present case, and I do not find anything in the evidence which satisfies me that when the respondent refused to join the appellant at Gilgil he withdrew his consent to its continuance. In other words I do not find it proved that the factum of true separation supervened at this stage. The mere request was not in the circumstances enough in my judgment; had there been acceptable evidence that it was made in such terms as to indicate that the petitioner’s consent to the existing arrangement would be withdrawn if the request was refused, the position would have been different. There was no such evidence. The appellant might have manifested the withdrawal of his consent

in other ways, but he did not do so—he went as usual to Nanyuki in the first vacation in 1956. Much later, in the correspondence, there are indications of a change of attitude on his part, but that does not assist him in proving the factum of separation in late 1955 or early 1956.

For these reasons and for the reasons given in the judgment of the learned Vice-President, I find that the appellant failed to discharge the onus upon him of proving desertion by the respondent and would also dismiss the appeal with costs.

Connell J: I also agree.

I have come to the conclusion that the primary act relied on as “desertion” in the petition, namely the refusal by the respondent to live with the petitioner at Gilgil in January, 1956, has not been proved beyond reasonable doubt.

Appeal dismissed.

For the appellant:

CS Rawlins

For the respondent:

GH Mann

For the appellant:

Advocates: *Geoffrey White & Co*, Nakuru

For the respondent:

Cresswell, Mann & Dod, Nakuru

Gurdit Singh v United Motor Works [1961] 1 EA 200 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 March 1961
Case Number:	3/1960
Before:	Sir Alastair Forbes V-P, Crawshaw JA and Sir Owen Corrie Ag JA
Appeal from:	H.M. Supreme Court of Kenya—Farrell, J

[1] Negligence – Insurance agent – Liability – Agent undertaking to procure insurance – Cover note issued – Proposal form mislaid – Insufficient information given by agent to insurance company – No policy in force when damage incurred – Liability of agent to proposer.

Editor’s Summary

The appellant purchased a new car from the respondents and signed a proposal form for insurance with a

company for which the respondents were agents. The respondents issued a temporary cover note and accepted payment of the first annual premium. The respondents, having mislaid the signed proposal form, lodged with the insurance company another form which was incomplete in certain details and before the company had decided whether to accept the proposal, the appellant's car was badly damaged. The appellant's claim upon the respondents and their principals, the insurance company, for the damage to his car was repudiated whereupon the appellant sued both. By their amended defence the respondents alleged that they had forwarded a copy of the cover note to the company which later orally accepted the proposal. The trial judge dismissed the action against both the respondents, as agents, and the insurance company holding that when the appellant signed the proposal form and left it with the respondents, the latter became the agent of the company and, accordingly, the respondents incurred no liability to the appellant in respect of their failure to forward the proposal to the company. In appealing from this judgment the appellant did not join the insurance company as respondents.

Held –

- (i) a person who, voluntarily and without consideration promises to procure an insurance is not liable to an action for non-feasance, because there is no consideration for his promise; but if he in fact enters upon the performance of his undertaking, he is legally bound to use due care and skill.
- (ii) the payment of the premium to the respondents by the appellant was not a consideration for a promise by the respondents to obtain a policy on his behalf.
- (iii) the respondents did undertake to procure a policy of insurance for the appellant and did enter upon the performance of its undertaking by issuing the cover note; having mislaid the signed proposal form, the respondents by preparing and submitting a substitute proposal which lacked all the information required by the company, and which they signed in the appellant's name, were guilty of misfeasance.
- (iv) the appellant had unjustifiably included the insurance company in his plaint but when the respondents filed their amended defence he would then have been justified in applying for leave to add the insurance company as parties; therefore, on the appeal being allowed, the respondents should pay the appellant's costs against the insurance company and the costs awarded to the insurance company against the appellant as from the date of filing the amended defence.

Appeal allowed.

Cases referred to:

- (1) *Coggs v. Bernard*, 92 E.R. 107.
- (2) *Wilkinson v. Coverdale*, 170 E.R. 284.
- (3) *Sanderson v. Blythe Theatre Co.*, [1903] 2 K.B. 533.
- (4) *Besterman v. British Motor Cab Co., Ltd.*, [1914] 3 Q.B. 181.

March 3. The following judgments were read:

Judgment

Sir Owen Corrie Ag JA: This is an appeal against the judgment and decree of the Supreme Court of Kenya, given on October 9, 1959, whereby the appellant's suit against the Queensland Insurance Company Limited (therein called the first defendants) and the respondents (therein called the second defendants) was dismissed with costs.

No appeal has been filed against the judgment in favour of the first defendants.

The relevant facts are stated in the judgment of the Supreme Court as follows:

"On November 27, 1954, the plaintiff bought a new Fiat 1100 motor car from the second defendants, a firm of automobile engineers, for the sum of Shs. 14,640/-. He asked the second defendants to arrange for the licensing and registration of the vehicle, and as in addition to their business of automobile engineers they held an agency from the first defendants for insurance business, the plaintiff asked the second defendants to obtain a policy for him with the first defendants. To this end the second defendants supplied the plaintiff with a blank proposal form and filled up the answers at his dictation. The plaintiff signed the proposal and paid the

second defendants Shs. 455/- being the amount (subject to share of commission) of a year's premium. The second defendants issued him a temporary cover note expressed to expire on December 26, 1954.

"Some time in January, 1955, the plaintiff made inquiries from the second defendants as to the reason why he had not yet received his policy.

In fact the second defendants had mislaid the proposal form and other relevant documents, and had not at that time informed the first defendants that a proposal had been made. On January 18, 1955, Mr. Lumb, on behalf of the second defendants, took what purported to be the plaintiff's proposal to one Mr. Shannon, a member of the staff dealing with insurance business at the Nairobi office of Messrs. Leslie & Anderson, the principal representatives in East Africa of the first defendants.

.....

"The proposal form was received by Messrs. Leslie & Anderson in Mombasa on January 26, 1955, but as some at least of the questions had not been answered, there was some further correspondence with the second defendants. Before any decision had been made whether the plaintiff's proposal should be accepted, on February 4, 1955, the plaintiff's car was considerably damaged as a result of a skid, and it is not disputed that the damages for the purposes of any claim amounted to Shs.9,000/-. A claim was presented to the first defendants and eventually the first defendants by a letter dated July 11, 1955, repudiated liability, on the ground that the cover note issued on November 27, 1954, had expired at the time of the accident, and, in effect that no policy had ever been issued. The plaintiff then brought these proceedings, in which he claims against the first defendants Shs. 9,000/- 'as damages for non-issue of the said insurance policy', and in the alternative against the second defendants a similar amount as damages for breach of warranty of authority. There is an alternative claim against the second defendants for breach of their undertaking to take all necessary steps to ensure the issue of a policy by the first defendants."

The claim against the respondents was dismissed by the learned judge in the following terms.

"In any case, whatever may be the position of the insurance agent who assists the proposer in filling up the proposal form, it appears to me that once the proposer has signed the form and left it with the insurance agent, the latter thereupon becomes the agent not of the proposer but of the insurance company, and, if this is so, no liability in respect of his failure to forward the proposal can be laid upon him vis-à-vis the proposer by reason of any relationship of agent and principal supposedly subsisting between them."

The first ground of appeal is as follows:

- "1. The decision of the trial judge proceeded per incuriam in that, the learned judge after having already held that the respondents (a) had accepted from the appellant and retained Shs. 455/- the agreed amount of the whole year's premium and the appellant's signed proposal form, and (b) had committed misfeasance in forwarding to the insurers, a substituted but concocted proposal form incomplete in certain material particulars and fabricated thereto the appellant's signature, with the result that at the time of the accident the plaintiff (appellant) was uninsured owing to the omissions in the proposal form, and the appellant suffered the loss claimed, he failed to hold—
 - (i) that the appellant's entrusting them with Shs. 455/- was sufficient consideration to oblige the respondents to be careful in preserving and forwarding with the requisite amount of the premium, the appellant's original proposal form to the insurers; and/or alternatively
 - (ii) that, in any case, even if the respondents gave to the appellant their undertaking in the matter of the insurance, gratuitously and without

consideration in law, the respondents had been guilty (as pleaded in para. 15 of the plaint) of negligence, i.e. for breach of their duty arising from their relationship with the appellant in law as shown by the evidence, apart from any contract, and

- (iii) that, even as gratuitous mandataries, the respondents were bound to act prudently and honourably and to exercise reasonable care and diligence in the matter of effecting the motor car insurance on the appellant's behalf."

As regards para. (i) it is difficult to see how the payment by the appellant of Shs. 455/- can be held to be consideration for a promise by the respondents. It is true that the proposal that the appellant should insure with the first defendants instead of with the Jubilee Insurance Co., with which the appellant's friend, Parmatma Singh, had had dealings, was made by Hayare Singh, a partner in the respondent firm. Again, according to the evidence of Mulchand Lal Lumb, the respondent's accountant, there was an agency commission of twenty per cent., of which the agents passed on to the insured a rebate of ten per cent. But it does not appear that the appellant, who, in spite of the fact that he had himself been "in garage business" since 1950, seemed ignorant with regard to the insurance of cars, had any idea that the respondents would benefit financially if he were to insure his car through them. He says:

"It was mainly to save the trouble of going elsewhere that I signed the proposal and paid the premium".

Accordingly, I am of opinion that the fact that he did so cannot be regarded as consideration for a promise by the respondents to obtain a policy of insurance on his behalf. Paragraphs (ii) and (iii) of the first ground of appeal allege liability for negligence on the part of the respondents in failing to obtain a policy of insurance for the appellant, notwithstanding that there was no consideration for their doing so. In making this submission the appellant is relying upon the rule in *Coggs v. Bernard* (1), 92 E.R. 107:

"If a man after taking a trust upon himself miscarried in the performance of his trust, an action will be against him for that, though nobody could have compelled him to do the thing."

(See 22 Halsbury's Laws of England (3rd Edn.), p. 48, note (a).)

That was a case of bailment, but the principle has been applied to a case of failure to insure in *Wilkinson v. Coverdale* (2), 170 E.R. 284, though in that case the plaintiff failed in proving any promise of the defendant to procure the insurance as stated in his case, and was non-suited. The rule has been stated in the following form:

"A person who, voluntarily and without any kind of consideration, promises to procure an insurance is not liable to an action for non-feasance, because there is no consideration for his promise; but if he in fact enters upon the performance of his undertaking he is legally bound to use due care and skill."

(See 22 Halsbury's Laws of England (3rd Edn.), p. 47.)

In the instant case it is clear, in my view, that the respondents did undertake to procure an insurance for the appellant; and that they did enter upon the performance of their undertaking: they issued to the appellant a cover note providing him with insurance up to December 26, 1954; and having mislaid the proposal form signed by the appellant, they prepared and submitted to the insurance company a substitute proposal form in which they failed to give the company the information required for the issue of a policy, and signed it

in the appellant's name. They were thus guilty of misfeasance.

In my opinion, therefore, the appellant is entitled to succeed on this count.

The second ground of appeal is in the following terms:

- "2. The respondents having by their conduct, caused the appellant necessarily to sue the first defendants, the Queensland Insurance Co. Ltd., the costs incurred thereby inclusive of costs the appellant was compelled to pay to the insurers, should have been awarded to the appellant against respondents."

Unless, however, the respondents gave the appellant to understand that they had authority not merely to receive from him the premium and proposal form but also to accept the proposal on behalf of the insurance company, and that they did accept it, it is clear that, in the circumstances, the appellant had no original cause of action against the company. The learned judge held that the respondents had no such authority, implied or expressed. He further held that the respondents gave no express undertaking that a policy would be issued nor warranty that they had authority to enter into a contract of insurance or to bind their principals to do so.

In my view, therefore, it was not due to the respondents' conduct that the appellant brought his unsuccessful suit against the company. Admittedly, before the action was filed, his advocate, on September 7, 1955, wrote to the first defendants asking them to let him have a copy of any written authority which the respondents possessed, but it would appear that this was merely to assist his case and that he had already decided to sue both defendants. In that letter it was said that the first defendants' actions had led the appellant to believe that the respondents were authorised to make contracts of insurance. I gather the appellant received no reply. A copy of the letter was sent to the respondents, but it cannot, I think, be said that they were under any duty in the circumstances to write to the appellant in connection therewith.

The appellant having, in my opinion unjustifiably included the first defendants in his plaint, the respondents on July 11, 1957, filed an amended defence, para. 7 of which reads:

"The second defendants duly forwarded to the first defendants a copy of the cover note and proposal form on January 26, 1955 (in performance of a duty owed by them to the first defendants and not any owed to the plaintiff), before the date of the accident, and the first defendants by their manager or agent at Nairobi, one Shannon, on the said January 26, 1955, verbally accepted the said proposal form and promised the second defendants that a policy of insurance in conformity therewith would be prepared by the Mombasa office of the first defendants and would be issued within a period of one week, and any breach or repudiation of the contract of insurance, was entirely on the first defendants' part."

This, I think, materially alters the position, for the respondents are here saying that the first defendants had accepted the proposal, and that only they, the first defendants, would be in breach of any duty.

Had the appellant in the first place filed a plaint against the respondents only, he would I think have been entitled on the filing of the respondents' amended defence to have applied to the court for leave to add the first defendants as a party; this is what was done in similar circumstance in *Sanderson v. Blythe Theatre Co.* (3), [1903] 2 K.B. 533, a case which was cited to us. There, because of the nature of the defence of the original defendants, leave was granted to add their agent, Hope, as a defendant. The plaintiff succeeded against the original defendants but not against Hope, and the court ordered the original defendants to pay the costs incurred by bringing Hope into the proceedings. The fact that in the instant case the appellant wrongly

instituted proceedings against the first defendants to start off with should not I think affect the matter if, after the filing of the respondents' defence, it would have been reasonable for him then to have joined them as defendants. In *Besterman v. British Motor Cab Co., Ltd.* (4), [1914] 3 Q.B. 181, the plaintiff was injured as the result of a collision between a motor cab and an omnibus. The owners of both vehicles were joined as defendants, and the court made an order for payment to the plaintiff by the motor cab company of the plaintiff's costs against the omnibus company and of the costs which the omnibus company recovered against the plaintiff. It was held:

"that the judge had a discretion to make the order, although before the issue of the writ the motor cab company had not intimated to the plaintiff their intention to throw the responsibility for the accident on the other defendants.

"There is no rule to the effect that, in order to justify an order on an unsuccessful defendant to pay a successful co-defendant's costs, the unsuccessful defendant must, before the issue of the writ, have given notice to the plaintiff that he is going to throw the blame on the other defendant; it is a question in all cases whether it was a reasonable and proper course for the plaintiff to join both the defendants in the action."

In my view the effect of para. 7 of the amended defence was to place the appellant, as from the date when it was filed in substantially the same position as the plaintiff in *Besterman's* case (4).

I would accordingly order that the judgment of the court of trial as between the appellant and the respondents be set aside and that judgment be entered for the appellant for Shs. 9,000/-, and that the respondents should pay the appellant's costs as between him and the respondents in the Supreme Court as well as of this appeal. I would further order that the respondents pay the plaintiff's (appellant's) costs against the first defendants as from July 11, 1957, and the costs awarded to the first defendants against the appellant, as from that date.

Sir Alastair Forbes V-P: I agree and have nothing to add. There will be an order in the terms proposed by the learned Justice of Appeal.

Crawshaw JA: I have had the advantage of reading the judgment of Mr. Justice Corrie, with which I agree.

Appeal allowed.

For the appellant:

GR Mandavia

For the respondents:

Mota Singh

For the appellant:

Advocates: *GR Mandavia*, Nairobi

For the respondents:

Mota Singh, Nairobi

Division: Court of Appeal at Kampala
Date of judgment: 9 January 1961
Case Number: 179/1960
Before: Sir Kenneth O'Connor P, Crawshaw JA and Sir Owen Corrie Ag JA
Appeal from: H.M. High Court of Uganda–Sheridan, J

[1] Criminal law – Evidence – Accomplice – Corroboration – Receiving stolen property – Property stolen from post office – Goods in transit from Switzerland to local importers – Evidence by importers identifying stolen property from invoices and orders – Whether evidence admissible – Evidence Ordinance, s. 30 (U.).

Editor's Summary

The appellant had been convicted in the magistrate's court of receiving certain stolen watches and watch-bands. At the trial the principal witness was one Bosa, formerly a postal clerk at Kampala, who stated that he had stolen the goods from parcels in the post office while they were in transit from Switzerland to addressees in Uganda, and that he sold them to the appellant at prices below their value. After a caution the appellant made a statement to the police that he had received the watches from an African but he did not know the watches were stolen. The addressees of the parcels alleged to have been stolen gave evidence, mainly derived from their orders and invoices, that their parcels would have contained watches and watchbands, of the makes found on the appellant's premises. An appeal to the High Court was dismissed; the court held, *inter alia*, that on the question of corroboration the magistrate was entitled to rely on the statement of the appellant that the seller was an African and that Bosa said he was that African and that the makes and numbers of the watches corresponded. On further appeal counsel for the appellant contended that the appellant's statement that he had bought the watches from an African could not be corroboration of Bosa's story, that there was no corroboration that the goods were stolen, that the appellant did not know this when he bought them and that the evidence of the addressees, obtained from their correspondence with exporters in Switzerland, was not admissible to identify the watches.

Held –

- (i) not only was there ample corroboration of Bosa's story as a whole, but also specific corroboration of those items in the story, or some of them, which tended to show guilty knowledge on the part of the appellant.
- (ii) the appellant's statement that he had purchased the watches from an African and that he did not know where the African had got them certainly tended to show that the appellant knew, or should have known, that they were stolen goods.
- (iii) while it would have been better if the magistrate had had evidence before him of the conditions which made s. 30 of the Evidence Ordinance applicable, he seemed to have been satisfied that the attendance in Kampala of witnesses from Switzerland could not be procured without unreasonable expense or delay.

- (iv) the addressees were fully entitled to give oral evidence of orders which they had placed in Switzerland and to refresh their memories beforehand by consulting their files of correspondence and invoices, whether these documents were put in evidence or not; if there was any irregularity in the admission in evidence of these documents, it did not occasion a failure of justice and the court would be prepared to apply s. 347 of the Criminal Procedure Code.

Appeal dismissed.

Cases referred to:

- (1) *R. v. Mullins*, 3 Cox C.C. 526.
- (2) *R. v. Baskerville*, [1916] 2 K.B. 658; 12 Cr. App. R. 81.

Judgment

The following judgment prepared by **Sir Kenneth O'Connor P:** was read by direction of the court:

The appellant was charged before a resident magistrate in Uganda on five counts of receiving stolen property (watches and watch-bands) on various dates between January and March, 1959. On September 28, 1959, the learned resident magistrate ruled that the appellant had no case to answer on these counts because the property found in possession of the appellant was not sufficiently identified with the property proved to have been stolen. He, therefore, acquitted the appellant on all five counts. The Crown appealed to the High Court. The High Court upset the resident magistrate's decision holding that it was perverse and unreasonable and sent the case back with an intimation that the appellant had a case to answer. The appellant appealed to this court against the decision of the High Court. On June 17, 1960, we dismissed the appeal and ordered that the appellant be required to answer all five charges.

The appellant then, being called on for his defence, declined to offer any evidence. The learned resident magistrate gave judgment on August 2, 1960, convicting the appellant on all five charges and sentenced him to seven years' imprisonment on each count, the sentences to run concurrently.

Against these convictions and sentences the appellant appealed to the High Court. On October 17, 1960, the High Court dismissed the appeal against the convictions, but reduced the sentences to five years' imprisonment on each count to run concurrently. Against that decision the appellant appeals to this court.

The appellant was at all material times a shopkeeper in Kampala. The precise nature of his business is not very clear. Apparently he sold bed-sheets and other textiles; but he may also have dealt in watches and watch-straps.

The principal evidence against the appellant was that of an approver, a former employee of the Posts and Telegraphs Department in Kampala, by name Laurensio Bosa. Bosa was arrested on February 21, 1959, and gave information to the police implicating the appellant. On May 7, 1959, Bosa pleaded guilty to stealing watches from the post office and was sentenced to four months' imprisonment. After having completed his term of imprisonment, he turned approver and gave evidence against the appellant. Bosa testified *inter alia* that since 1958 he had been employed in the parcels section of the post office: he had worked under one Kartar Singh. He had access to the whole section of the parcels office. He had a uniform—a khaki uniform with red edges and the letters "P. & T." on it: he wore this uniform from 8 a.m. till 4.30 p.m. daily from Monday to Friday and 12 noon on Saturdays: he was allowed to take it home and to take it with him at lunch time.

An extract from Bosa's evidence is as follows:

"I know accused.

“One day, while walking on the Bombo Road, I went to his shop where I saw two boys—the shop just beyond Gailey and Roberts new building and Norman Cinema. I saw the boys (African) hand the accused a camera. Accused kept it. I don’t remember the date—the month was January, 1959. I was in the doorway of the shop when I saw this. I entered the shop. I wanted to buy bedsheets. I saw accused give these two boys money. The boys went out.

“Accused asked me in Swahili what I wanted. I said bedsheets. He showed me some bedsheets. He asked me if I worked with the post office. I said I did. He asked which office I worked in—letters office or parcels office. I said parcels office. He said ‘If you work in the parcels office you can bring me some parcels; I shall buy them.’ I asked him what sort of parcels. He said: ‘Watches, cameras, and other things.’ I asked him where I should get the parcels from. He said, ‘Whenever you see parcels with the words ‘City Watch Company’ or ‘Western Watch Company’ that means that the contents are watches.’ I said I would try.

“I am not accused’s servant. I understood I would get money if I brought parcels from the post office. I called at accused’s shop at 1.00 p.m. I was not on duty. It was the break. I was in uniform. It was my first visit to the shop. At the time of this conversation there was no one else present.

“I bought the sheets and went. I went to work and took watches for accused. I got the watches from the post office. From a certain office called Parcels on Delivery. That was in the old post office. While I was arranging the parcels I saw parcels on which was written ‘Western Watch Company’. I made a hole in the parcel and took out the watches. I did this about 10.30 a.m. The Asians were in a separate room. There was one Asian at the counter delivering things. I took out about thirty watches. They were loose watches. I had dealings with accused about them.

“I went there a third time—it was in February. I went to see him. I wanted to buy things from him. He then asked, ‘Have you not yet got watches?’ I said I had not. I went away. I got some watches which I took to him. It was in February. I got them from a parcel in the post office. It was a box. I took the whole box. I took it before I opened it. It was whiteish in colour. It was about 6/8? deep. It had marks on it. I don’t remember any of them. I can’t remember the numbers—think they were 11641. These figures were in red. There were no other markings. I took the box to accused. It was about 11.30 a.m. I was on duty. I did not ask permission to go. We opened the box. We saw watches in it. I read some of the names on the watches— some were Oris and some Arcadia. They were gents watches. There were sixty-seven of them. Accused gave me money. I went away. We discussed the price. I asked for Shs. 30/- for each watch. He said ‘How can I possibly give you Shs. 30/- on stolen watches? I shall give you Shs. 4/- or Shs. 5/- or Shs. 6/- for each’. I agreed to that. He paid me Shs. 4/- for the cheap watches and Shs. 5/- and Shs. 6/- for the dearer. On that occasion he gave me about Shs. 480/-.

“No one was present when this transaction took place. I was in my post office uniform. Accused gave me no receipt for the watches. I went away. I left the box behind. It was a wooden box. I have seen that box (exhibit G.). That is the box I took. I remember the number in red. I said before the number was 11641. I say I was wrong in the number before. I know the box by the appearance. Accused opened the box. He opened one end with a certain instrument.”

.....

“I said there were sixty-seven watches in the box. I now say that the box contained Jicho watches and some other types of watches.

“The watches in the box were in boxes. They were in boxes similar to these blue and white boxes—both the small and the large boxes. The boxes were white and blue. That is what I call white and that is what I call blue. (Points to blue and white colours). The watches were all in boxes –Jicho watches in small boxes, Donada watches in large boxes. After accused paid me on that occasion I went to work. Then when I found other

watches I took them. This happened in March. I found them in the post office—in the office where I was working. I arranged the parcels when they came from another office to my office. The watches were contained in parcels. I used to make a hole in the parcel and take out the watches. The watches I took out were in boxes. They were in a box similar to that box (rectangular gray box containing Donada). There were about three boxes. The other two were similar to these rectangular blue and white boxes (containing Jicho watches).

“I took these watches to accused. That was at 1.00 p.m. I was in my khaki uniform. Accused examined the watches and paid me. I don’t remember the number of the watches. I have no idea. He paid me about Shs.250/-. He paid straight away. No one else was present when accused took the watches. Then I went to work.

“During the same month I stole other watches. I did it in the same way. I made a hole in a parcel. I took out watches. I put them in the pockets of my shorts. These watches were in boxes—in about twenty boxes. They were in two colours—yellow and white. They were similar to those boxes (Arcadia boxes). I took them to accused. He paid me about Shs. 150/- for them. No one was present.

“I went back to work and after some time during April I took about twenty-three watches. I did this in the same way. They were in boxes. They were loose when I took them out of the boxes. They were Jicho watches and Roma watches. I took twenty to accused and kept three. That was at 5.00 p.m. No one was present when I took them to him. Accused did not pay me. He told me to get more watches and he would pay me for the lot. I went away.

“I did not take any more watches. I sometimes also used to take watches in small numbers, two to three at a time. In all I took watches about seven to eight times. On all of these occasions I took the watches to the accused. No one was present when I saw the accused. Accused’s wife was at the back of the shop. She saw me, I saw her.

“I think the total number of watches I took was between 350 and 370.

“I look at these black boxes (exhibit A). I think these are the watches I took on the very first occasion from the old building. I took about four boxes. There were over twenty-five watches in them. Each watch was contained in a small box similar to that small black box.

“I have seen a box similar to that (Virtus box). I took it in March from the post office. I took it to accused. Accused paid me Shs. 70/- for it. I can’t remember how many watches were in the box.

“I know accused’s name is Mohamed. I read the name on his shop window. He himself never told me his name.

“In April, 1959, I was arrested by the police. The police officer who arrested me was Mr. Malik. After arrest I was taken to the police station. From the police station I went and showed the police the shop to which I took the watches. The police had asked me where I put the watches I stole. I had admitted stealing the watches. I went of my own accord to show police the accused’s shop. I pointed out the shop to Malik.”

Superintendent Bruce of the Divisional Crime Office, Kampala, described how, accompanied by Sub-Inspector Malik, he went to the shop of the appellant on April 22, 1959, at 2.15 p.m. An extract from his evidence is:

“I said to accused I was making enquiries regarding a small number of Jicho watches and six Roma watches which had been stolen from the

post office and that I had reason to believe that he may have bought them. He shook his head and said he knew nothing about them. I then produced a search warrant and said I did not wish to inconvenience his family but I would have to search his premises.

“He then went to his counter and produced twenty-one Jicho watches and told me that he had bought these from an African. I then commenced to search his premises.

“During the search I found a locked cupboard which was part of his showcase. I asked him for the key of the cupboard. He told me he could not find it. I took a drawer out of the cupboard which gave me access to the cupboard itself. I reached inside. I found that it contained 354 watches, ten gold watch bands, various cameras and other items. Of those watches there were:

- (a) Twenty Oris watches, and
- (b) Seven Virtus watches bearing labels marked 2140/3.

“I now produce the twenty Oris watches as I found them in their packets (exhibit A). These are the seven Virtus watches as I found them in the box (exhibit B).

- (c) Sixty-eight Jicho watches.

“I now produce these as I found them in these boxes (exhibit C).

- (d) Eleven Arcadia watches.

“The boxes containing these were labelled ‘The City Watch Company’. On the face of each watch was printed the words ‘The City Watch Co.’ I produce these watches in the boxes as I found them. (Exhibit D). All these watches had tags on them bearing the No. 616700.

- (e) Ten rolled gold wrist bands for watches named ‘Fixoflex’, pattern No. 14770.

“These were all in one box. I now produce them as I found them (exhibit E).

- (f) Sixty Donada watches in four boxes.

“I now produce these as I found them (exhibit F).

“I searched the remainder of accused’s premises and on some sacks in his storeroom I found a wooden box. There were two labels on it—one marked ‘Holder Bank’ No. 371 and a label with Geneva 5. On the side were painted letters in black ‘To/SMK–59/10/17’. In red crayon were written letters T 11614.

“I now produce the box (exhibit G). Accused was not with me when I found the box. I walked back into the shop holding the box. I cautioned accused and said to him, ‘Where did you get all these watches?’ He said ‘That African brought them’. Without saying anything further he began to put the watches in the box. He took the box out of my hand to do so.

“I took the box and told accused I was taking the box and the watches to the Central Police Station. I asked him if he would like to come with me to give an explanation of how he came by the watches. He came with us to the Central Police Station. I took all the watches and the box to the Central Police Station. They were handed to Sub-Inspector Malik.”

Inspector Malik corroborated the evidence of Superintendent Bruce, in particular the finding in a drawer and in a locked cupboard in the appellant’s premises of 354 new watches all of which the appellant said he had bought from the same African, and the finding on his premises of an empty box with the numbers 371 and T 11614. According to this witness the appellant, when asked, had produced twenty-one watches and said that he had no more.

A postal official, Kartar Singh, gave evidence of parcels in the post office having been found tampered with and the contents (or some of the contents)

missing. Kartar Singh also produced a post office record of a parcel from Geneva addressed to the Hagemeyer Trading Co. of which the original number had been three hundred and seventy-one and which had been given a local number T/11614. This parcel, he said, had been missing altogether. It will be recalled that a box with these numbers was found in a store on the appellant's premises and Bosa testified that he had taken it from the post office to the appellant's premises where it had been opened and the appellant had bought the watches which it had contained.

The addressees of various parcels were called and gave evidence, mainly derived from orders and invoices, that their parcels would have contained watches and watchbands of the makes found on the appellant's premises.

The appellant made a cautioned statement to the police in which he said that it was true that he had received the watches from an African but he did not know where he (the African) used to bring them from and did not know that the watches were stolen.

The learned magistrate correctly directed himself that Bosa was an accomplice and that his evidence required corroboration. He found this corroboration in the various matters which he set out. The High Court considered that some of the matters on which the magistrate had relied as corroboration did not amount to corroboration, but found that the magistrate was entitled to rely on others. In particular, the learned judge said that the magistrate was entitled to rely on the statement of the appellant that the seller was an African and that Bosa said that he was that African and that the makes and numbers of the watches corresponded.

In this court Mr. Wilkinson, for the appellant, attacked that passage in the judgment of the learned judge contending that the appellant's statement that he had bought the watches from an African could not be corroboration of Bosa's story: the point being did the appellant buy the watches from Bosa—a particular person? We think that the appellant's statement that he bought the 354 watches from an African, or "that African" as Superintendent Bruce says, and not from importers or wholesalers, as might have been expected in an ordinary trade transaction, was some corroboration of Bosa's story that the appellant had bought the watches from him. The appellant's statement that he had purchased all these watches from an African and that he did not know where the African had got them from certainly tended to show that the appellant knew, or should have known, that they were stolen goods. It is to be noted that the passage in the learned judge's judgment of which complaint is made follows a passage in which he had been discussing the question of the appellant's guilty knowledge.

Mr. Wilkinson submitted that corroboration of the evidence of the accomplice must go to two matters, namely (a) that the goods were stolen and (b) that the appellant had knowledge of this when he bought them.

We propose to deal first with (a) and to see what corroboration the magistrate had before him of the accomplice's evidence that the goods which he stole were those found on the appellant's premises. Confirmation by independent evidence of everything that an accomplice relates is not of course required in order to corroborate the accomplice: *R. v. Mullins* (1), 3 Cox C.C. 526, 531. What is required is some independent testimony which affects the prisoner by tending to connect him with the crime; that is evidence, direct or circumstantial which implicates the prisoner, which confirms in some material particular not only the evidence given by the accomplice that the crime has been committed, but that the prisoner committed it. *R. v. Baskerville* (2), [1916] 2 K.B. 658; 12 Cr. App. R. 81.

In the first place, the search of the appellant's premises was carried out as a result of Bosa's statement

to the police. Bosa had said that he had stolen watches and had taken them to the appellant.

In his evidence Bosa said that he had stolen and sold to the appellant watches of Oris, Arcadia, Donada, Jicho, Roma and Virtus brands to a total of between 350 and 370. On a search of the appellant's premises 354 watches were found, not displayed for the public to view, but locked in a cupboard. Their brands were Oris, Arcadia, Donada, Jicho and Virtus. These the appellant said he had bought from an African or, according to Superintendent Bruce, "that African".

Bosa said in his evidence that one parcel which he had stolen from the post office was a box then containing watches. That box he identified. It was proved to have come from Geneva, to have been marked with the numbers 371 and 11614 and to have been addressed to the Hagemeyer Trading Co. That box was found on the appellant's premises.

Again, Mr. Vohr, a director of the City Watch Co. Ltd., testified that he had placed an order with his suppliers for one hundred Arcadia watches on a special specification which required that the name of the retailers "City Watch Co. Ltd." be printed on the face of the watch. The parcel was found in the post office tampered with and empty. Bosa said that he had made a hole in a parcel, taken out about thirty boxes (similar to Arcadia watch boxes which he was shown) and had taken them to the appellant who had paid him about Shs. 150/- for them. Eleven Arcadia watches, each of which had inscribed on its face the words "The City Watch Co.", were found on the appellant's premises.

Again, Bosa said that he took ten stolen wrist-bands to the appellant's premises. Ten wrist-bands, similar to the stolen bands, were found on the appellant's premises.

There was a great deal more evidence which it is unnecessary to set out. Notwithstanding that the watches (except those specially inscribed) were of makes commonly on sale in Kampala, we are of opinion that there was more than ample corroboration of Bosa's story, and abundant evidence on which the learned magistrate could reasonably conclude that Bosa's evidence was to be relied upon and could reasonably find that the goods discovered on the appellant's premises were the goods stolen and taken to him by Bosa.

Mr. Wilkinson, for the appellant on the appeal to this court, confined his argument mainly to the question of guilty knowledge. He submitted that the matters on which the learned trial judge had relied as corroboration of Bosa's story that the appellant had knowledge that the goods were stolen were not corroboration. He said that Bosa's evidence that he had worn Posts and telegraphs uniform at the interviews with the appellant was uncorroborated; that the alleged sale below value was uncorroborated; and that there was no evidence that the appellant was not, in the ordinary way of business, a buyer and seller of watches; the appellant had not denied knowing anything about the watches when approached by the police, his denial had been of knowledge of *stolen* watches. Mr. Wilkinson contended that if single items tending to show guilty knowledge were not enough, the cumulative effect of these could not be enough to show guilty knowledge.

Assuming in the appellant's favour that although, as we have held, there was ample corroboration of Bosa's story as a whole, it was necessary to look for specific corroboration of those items in the story, or some of them, which tended to show guilty knowledge on the appellant's part, we are of opinion that there was such corroboration.

As to the uniform, although there was no evidence except that of Bosa that he wore it at his interviews with the appellant, there was independent evidence that he wore uniform daily while on duty and was not required to hand it in when off duty. The appellant received 354 watches from an African or "that African", and said that he did not know where he (the African) used to bring them from. Eleven of these

were inscribed with the name of the retailer, the City Watch Co. Ltd. The appellant had in his premises a postal packet, a

wooden box, which had contained watches with the name of the addressee Hagemeyer & Co. Ltd., still on it. This Bosa said he had stolen and taken to the appellant. Even if the appellant was not the instigator of the thefts as alleged by Bosa and even if (which we do not believe) he did not know that Bosa worked in the post office, visits of an unidentified African with boxes of new watches of a considerable total value and, on at least one occasion with a postal packet addressed to someone other than the appellant, must have afforded reason to believe that the goods were stolen. In our opinion, there was ample independent corroboration of Bosa's story that the appellant knew or had reason to believe that the goods he was receiving were stolen goods.

Ground 1 of the memorandum of appeal raised a point which was not argued before us, but with which we had, perhaps, better deal. This ground of appeal alleges that the learned appellate judge misdirected himself in law in holding that correspondence between the importers of watches in Uganda and the exporters in Switzerland and orders sent to the said exporters was admissible to identify the watches the subject matter of the charges and that he did not sufficiently appreciate that the magistrate had no evidence before him which would entitle him to admit the documents in evidence under s. 30 of the Evidence Ordinance. The exhibits referred to appear to be a letter from an exporter in Switzerland, an order and an indent for watches from Switzerland and copies of invoices. The learned judge dealt with this matter as under:

"Mr. Wilkinson, for the appellant, submitted that the correspondence passing between the importers of watches in Uganda and the exporters in Switzerland should not have been admitted as in these days of air-travel, it is not difficult to procure the presence of witnesses from abroad. I agree that such a course is desirable but in the terms of s. 30 of the Evidence Ordinance, the attendance of such witnesses from Switzerland—and they might have been a number—could probably not have been procured without an amount of delay, or expense which, in the circumstances of the case, appeared to the court to be unreasonable. The learned magistrate did not specifically refer to this provision in ruling the documents to be admissible and it would have been better if he had heard evidence on the probable non-availability of these witnesses but by inference he seems to have been satisfied that the documents were admissible under s. 30 (2) of the Evidence Ordinance."

We agree. It might have been better if the learned magistrate had evidence before him of the conditions which make s. 30 of the Evidence Ordinance applicable. But he was entitled to take judicial notice of the facts that Switzerland is in Europe and that Kampala is in Uganda and he seems to have been satisfied that the attendance in Kampala of a witness or witnesses from Switzerland could not be procured without an amount of delay or expense which in the circumstances of the case appeared unreasonable. However this may be, these exhibits added very little, if anything, to the prosecution case. The Kampala importers were fully entitled to give oral evidence of orders which they had made from Switzerland and to refresh their memories beforehand by consulting their correspondence files and invoices, whether these documents were put in evidence or not. If there was any irregularity in the admission in evidence of these documents, it did not occasion a failure of justice and we would be prepared to apply s. 347 of the Criminal Procedure Code.

In our opinion there was an overwhelming case against the appellant. There is nothing in the appeal to this court which would justify our interfering with convictions which were thoroughly justified on the evidence. The appeal is dismissed.

Appeal dismissed.

For the appellant:

PJ Wilkinson QC and BE D'Silva

For the respondent:

SK Kulubya (Crown Counsel, Uganda)

For the appellant:

Advocates: *Wilkinson & Hunt*, Kampala

For the respondent:

The Attorney-General, Uganda

The Attorney-General of Uganda v National Industrial Credit (EA) Ltd [1961] 1 EA 214 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	23 March 1961
Case Number:	43/1960
Before:	Sir Alastair Forbes V-P, Gould JA and Sir Owen Corrie Ag JA
Appeal from:	H.M. High Court of Uganda–Lewis, J

[1] *Street traffic – Hire-purchase – Private hire motor vehicle – Use of unlicensed vehicle – Mandatory cancellation of vehicle’s registration and licence – Vehicle on hire-purchase agreement to accused – Vehicle re-possessed by hire-purchase company – Application by company to revoke order for cancellation – Whether company can make application as owner – Meaning of “owner” – Criminal Procedure Code, s. 337, s. 339 and s. 341 (b) (U.) – Traffic Ordinance, 1951 (as amended by Traffic (Amendment) Ordinance, 1960), s. 2, s. 83 (U.).*

Editor’s Summary

The respondent, a finance company, had entered into a hire-purchase agreement of a car with one Yusufu Serunkuma and though it was stated in the proposal form that the car was to be used for private hire purposes, he did not so license it. On September 3, 1960, Yusufu Serunkuma was convicted of an offence under s. 83 (1) (a) of the Traffic Ordinance, 1960, of using the car for the carriage of passengers whilst it was unlicensed for the purpose. The trial magistrate as required by sub-s. (3) of s. 83 of the Ordinance cancelled the registration of the car. The instalments due under the agreement not having been paid the respondent company subsequently resumed possession of the car and in November, 1960, applied in the magistrate’s court under sub-s. (6) of s. 83 *ibid* for revocation of the order of cancellation of registration. This sub-section provides that “A court which has made an order . . . may, on the application of . . . the owner of the motor car so specified, . . . revoke such order at any time after it has been made”. The application was refused on two grounds, namely, (a) that the word “owner” in the sub-section meant the owner at the date of commission of the offence, and that by definition at that date the owner was the person in possession under a hire-purchase agreement, i.e. Yusufu Serunkuma, and not the respondent

company and (b) that even if the respondent company could, as “owner” at the date of the application make such an application, it had failed to make a case for revocation of the order. The respondent company then applied to the High Court to review the magistrate’s decision under s. 339 of the Criminal Procedure Code, which in reversing the magistrate’s order, ordered that the order of cancellation of registration be revoked and held that the test to be applied in such application was “whether the owner was a party to the offence of using the vehicle without a licence by the person in possession”. The Attorney-General thereupon appealed challenging the test applied and also contending that it had not been shown that the magistrate had exercised his discretion unjudicially or on wrong grounds and therefore there was no justification for interfering with his decision.

Held –

- (i) the test applied by the judge put too narrow a limit on the discretion of the court, which under s. 83 (6) *ibid* was unfettered; the Court of Appeal could not lay down any specific test and each case must be considered on its merits.
- (ii) if a hire-purchase company could show that it had taken such reasonable

precautions as were open to it to secure that the hirer of a car did not use it to contravene the provisions of s. 83 of the Traffic Ordinance, it would have made out a case for the exercise of the court's discretion in its favour.

- (iii) in the instant case there was no suggestion that the respondent company had connived in any way at the illegal use of the car, and in the circumstances, it was proper in the exercise of the court's discretion to confirm the revocation of the order for cancellation of registration made by the High Court.

Appeal dismissed.

No cases referred to in judgment

Judgement

Sir Alastair Forbes V-P: read the following judgment of the court: This is an appeal from an order of the High Court of Uganda made in revision under s. 341 of the Criminal Procedure Code.

The respondent company (hereinafter referred to as "the company") carries on the business of hire-purchase finance in Uganda. In June, 1960, it entered into a hire-purchase agreement with one Yusufu Serunkuma in respect of the purchase of Morris Isis car No. URS. 205, it being stated in the proposal form that the purpose for which the car was going to be used was "P.H.M.V.", i.e. private hire motor vehicle, purposes. In fact, Yusufu Serunkuma did not license the car as a private hire motor vehicle. On September 3, 1960, Yusufu Serunkuma was convicted of an offence under sub-s. (1) (a) of s. 83 of the Traffic Ordinance, 1951, as amended by the Traffic (Amendment) Ordinance, 1960 (hereinafter referred to as "the Ordinance") in connection with the car, that is, of using the car for the carriage of passengers without its being licensed for the purpose. Yusufu Serunkuma admitted having been convicted of an offence under the same section on August 2, 1960. Consequently the learned magistrate who heard the case against Yusufu Serunkuma was required by sub-s. (3) of s. 83 of the Ordinance to cancel the registration of the car. That sub-section reads as follows:

"83. (3) Where any person is convicted of an offence under the provisions of sub-s. (1) of this section and has previously been convicted of an offence under such provisions or of a similar offence under the provisions of this Ordinance prior to its amendment by the Traffic (Amendment) Ordinance, 1960, the court shall, in addition to any other penalty which it may impose, order the cancellation of—

- (a) the registration of the motor car used at the time of the commission of such offence; and
- (b) the licence issued under the provisions of Part III of this Ordinance in respect of such motor car,

and shall order that for such period, being not less than six months and not exceeding two years, as it may direct, such motor car may not be registered or licensed by any person."

The learned magistrate cancelled the registration and licence for twelve months.

The company subsequently resumed possession of the car for non-payment of the hire-purchase instalments, and, in November, 1960, applied to the magistrates' court under sub-s. (6) of s. 83 of the Ordinance for revocation of the order of cancellation of registration. The material part of that sub-section reads as follows:

“83. (6) A court which has made an order—

.....

(b) under the provisions of sub-s. (3) of this section that for a specified

period a specified motor car may not be registered or licensed, may, on the application of . . . the owner of the motor car so specified, . . . revoke such order at any time after it has been made.”

The learned magistrate who heard this application refused it on two grounds: first, that “owner” in sub-s. (6) of s. 83 means the owner at the date of commission of the offence, and by definition at that date the owner was the person in possession under a hire-purchase agreement, i.e. Serunkuma, and not the company; and, secondly, that even if the company could, as “owner” at the date of the application, make application under sub-s. (6) of s. 83, it had failed to make a case for revocation of the order.

On the application of the company the matter then came before the High Court in the exercise of its revisionary jurisdiction under s. 339 et seq. of the Criminal Procedure Code. The learned judge of the High Court reversed the learned magistrate’s order, and ordered that the order of cancellation of registration be revoked. The Attorney-General has appealed against this decision under s. 337 of the Criminal Procedure Code, which applies to orders of the High Court on revision by virtue of sub-s. (6) of that section.

The learned judge dealt with the first point on which the learned magistrate founded his decision, namely, that “owner” is sub-s. (6) of s. 83 of the Ordinance means the owner at the date of commission of the offence, and that the definition of “owner” in s. 2 of the Ordinance excluded the company as at that date, as follows:

“The first point taken by the petitioner was that the lower court, on the application to revoke, was wrong in holding that as Yusufu Serunkuma was the owner of the vehicle at the date of the offence, only he could make the application. The court came to this decision from the definition of ‘owner’ in the much mauled and amended Traffic Ordinance. Mr. Dickie, for the Crown, explained that the definition of owner was inserted so as to avoid placing on hire-purchase concerns all the duties of owners under the Ordinance. Mr. Dickie then conceded that for the purpose of s. 83 (6) of the Ordinance the legal owner of the vehicle or the person in possession had a right to apply for revocation. I had come to the same view. However, in deference to the learned magistrate, who also had doubts about the matter, I give my reasons. If the only person who could apply for revocation was the person in possession of the vehicle, the owner would find himself for ever barred if the driver should die or abscond. The legislature could not have intended such a manifest injustice to owners of vehicles.”

We were, with respect, unable to follow the reasoning in this passage and the concession alleged to have been made by Mr. Dickie, and could see no reason for ignoring the definition of “owner” contained in the Ordinance. Crown Counsel who appeared before us, however, stated that Mr. Dickie’s concession had apparently been misunderstood as it was incorrectly recorded; that in fact what the Crown intended to concede was that “owner” in sub-s. (6) of s. 83 of the Ordinance meant the owner at the date of the application, and that, as the company had then resumed possession, it was then the owner of the car. On the basis of this concession he did not seek to challenge the right of the company to make the application under sub-s. (6) of s. 83. This construction of sub-s. (6) of s. 83 is a possible one and we accept the concession for the purposes of this case without expressing a final opinion on the point.

The second aspect of the matter, that the company had failed to make out a case for revocation of the order of cancellation, was dealt with by the learned magistrate as follows:

“If I am wrong, and it is considered that a person who becomes an owner (for whatever reason) between the date of the conviction and the application, can invoke this section I now consider whether the applicant

has been able to adduce reasons which would make it unjust to allow this cancellation order to remain, as against the applicant. What are the facts?

“The applicants are a finance corporation which deals in contracts of this kind. They are not babes in arms.

“This transaction was entered into after the amendments in the Ordinance came into being on June 1, 1960. They would be seised of its new provisions.

“On the proposal form the accused said he was going to engage in P.H.M.V. business. They must have known that these licences are limited in number and difficult to get. They took that risk. In this case Serunkuma did not get a licence.

“They must have advanced money hundreds of times on private cars (which they have had to repossess) so even if a P.H.M.V. were not forth-coming they would have been perfectly happy if the instalments were paid regularly.

“They say here that they are ‘innocent sufferers’ by reason of the cancellation order cannot dispose of the car. They cannot guarantee the sale of *any* repossessed car. That is another risk they take.

“In this case they point out that they would not be able to find a buyer in Uganda for this vehicle for the obvious reason that the car could not be licensed. They could sell or try to sell it outside Uganda, e.g. Kenya, where the car could presumably be registered. Presumably they have offices in other territories.

“If the company had come to the court and said they had a prospective buyer, if the order were revoked, there would perhaps be more force in their argument. They did promise not to sell it to Serunkuma.

“When finance corporations advance money on these cars they know that the transaction is attended with many risks. That is why the agreements appear to be unconscionably hard on the purchaser. They enter into these transactions with their eyes wide open.

“I do not consider, even if the applicants were held to have locus standi under s. 83 (6) of the Traffic Ordinance for the purpose of this application, that they have made out a case for the revocation of this order made by Mr. Neve on September 3, 1960, and I would have dismissed the application.”

In his order on revision the learned judge said:

“I now turn to the more difficult question whether, to use the words of the lower court, ‘the applicant has been able to adduce reasons which would make it unjust to allow this cancellation order to remain’. The first thing which must be noted about s. 83 (2) (b) (sic) of the Ordinance is that it does not contain any such words as ‘for sufficient reason’ or ‘good cause’; the discretion is unfettered. The lower court decided that as the petitioner knew of the amended Ordinance, and knew that Yusufu Serunkuma was going to use the vehicle as a private hire car, they took the risk of his failing to get a licence and using the car illegally and being convicted.

“In my opinion the petitioner cannot be said to have undertaken anything. What is stated on the proposal form is irrelevant, and the use to which the vehicle is put is also irrelevant. The test to be applied is whether the owner was a party to the offence of using the vehicle without a licence by the person in possession. As there was no suggestion of that here I consider that the order of cancellation should have been revoked. I order accordingly.”

Crown Counsel made it clear that the principal matter challenged on the appeal was the test laid down by the learned judge as the one to be applied to applications under sub-s. (6) of s. 83, namely,

“whether the owner was a party to the offence of using the vehicle without a licence by the person in possession”.

He further argued that, apart from this, it had not been shown that the learned magistrate had exercised his discretion unjudicially or on wrong grounds and therefore there was no justification for interfering with his decision.

So far as the test indicated by the learned judge is concerned, we can, with respect, see no justification for the limitation of the discretion of the court in the manner suggested. Mr. Troughton, who appeared for the company, did not attempt to support the test in its literal form, but suggested that by “party to the offence” the learned judge must have meant not only an owner who was legally a party to the offence, but one who might be said to have a moral responsibility for the offence. We think even this construction puts too narrow a limit on the discretion of the court which, under sub-s. (6) of s. 83 is unfettered. Certainly if it were shown that the owner had a legal or moral responsibility for the offence, that would be a good reason for refusing an application under the sub-section. But there may be other matters which could be relevant. For instance, on the basis of the interpretation of “owner” in sub-s. (6) accepted by the Crown, a purchaser of a car the subject of a cancellation order would be an owner able to make application under the sub-section. Such new owner would not be a party in any sense to the offence committed by the original owner; but the object of the Ordinance would clearly be defeated if such new owner were to be regarded as entitled to revocation of the cancellation order. It would provide an original owner guilty of a second offence under sub-s. (1) of s. 83 with a simple method of evading the consequences which the legislature has determined should follow on his offence. For this reason we hesitate to lay down any specific test and think that each case must be considered on its merits.

In the instant case we have indicated that we do not agree with the ground upon which the learned judge held that the discretion of the learned magistrate was wrongly exercised. We have considered whether we should remit the matter to the High Court for further consideration, but think it preferable that we should ourselves consider whether the learned magistrate’s ruling should be upheld.

As we see the matter, the learned magistrate has said in effect that in every case in which a hire-purchase company enters into a hire-purchase agreement in respect of a car which is intended to be used in “P.H.M.V.” business, it must take the risk that the hirer will break the law and incur cancellation of registration of the car; and that if cancellation in fact occurs, the hire-purchase company must suffer. Carried to a logical conclusion, this argument is not confined to cars which it is proposed to use for “P.H.M.V.” business, but would apply to every car let on hire-purchase. We think this proposition goes too far, and that it is unreasonable to say that a hire-purchase company must be subject to an absolute risk of that nature; and for that reason we think the basis for the learned magistrate’s decision was unsound. It appears to us that if a hire-purchase company could show that it had taken such reasonable precautions as were open to it to secure that the hirer of a car did not use it to contravene the provisions of s. 83 of the Ordinance, e.g. by enquiry as to the past record of the hirer and the insertion of appropriate provisions in the hire-purchase agreement, and that it was not in any sense conniving at such a use of the car, it would have made out a case for the exercise of the court’s discretion in its favour. In the instant case there is no suggestion that the company connived in any way at the illegal use of the car. On the record

before us it is not clear what precautions, if any, the company took to secure the legitimate use of the car, and, of course, the onus under sub-s. (6) of s. 83 is on an applicant to show cause for the revocation of a cancellation order. Nevertheless, Crown Counsel did not suggest any actual fault on the part of the company and did not press strongly for restoration of the cancellation order so long as the test relied on by the learned judge was disapproved. In the circumstances we think it proper in the exercise of the court's discretion to confirm the revocation of the order for cancellation of registration made by the learned judge of the High Court.

We accordingly dismiss the appeal. Mr. Troughton asked that we should award costs to the company, but we do not think this is a case for deviating from the usual rule in criminal appeals, and we make no order as to costs.

Appeal dismissed.

For the appellant:

KT Faud (Crown Counsel, Uganda)

For the respondent company:

JFG Troughton

For the appellant:

Advocates: *The Attorney-General*, Uganda

For the respondent:

Hunter & Greig, Kampala

Re the Estate of Fatuma Binti Saleh [1961] 1 EA 219 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	15 March 1961
Case Number:	39/1946
Before:	Edmonds J

[1] Probate – Revocation of grant of administration – Application by motion for revocation – Opposition by grantee – Whether application should be by action or motion – Indian Probate and Administration Act, 1881, s. 50 – Indian Succession Act, 1925, s. 263 – Civil Procedure Ordinance (Cap. 5), (K.).

Editor's Summary

At the hearing of an application for revocation of a grant of administration to the respondent counsel for the parties agreed to argue the application on two grounds only, namely, that an application for revocation of a grant of letters of administration cannot be made compulsorily by motion but only by action, even if the applicant is an heir, and that the applicant was not an heir of the deceased entitled to the grant and could not bring an application to revoke the grant until he had established that he was an heir either by way of action or originating summons.

Held –

- (i) an application for the revocation of a grant where the grantee opposes must be brought under the Civil Procedure Ordinance by originating action, that is to say, by a civil suit, by petition, or by originating summons, whichever is applicable under the Ordinance.
- (ii) although an application for revocation of a grant can be made only by an heir or a creditor of the estate, it is not necessary that a person claiming to be an heir should, before making application, file a declaratory suit in order to establish the fact.

Application dismissed.

Cases referred to:

- (1) *Sardar Khan v. Gulam Fatuma and Public Trustee* (1931), 13 K.L.R. 36.
- (2) *In the estate of Sukhlal s/o Madhulal* (1949), 23 K.L.R. (Pt. 2) 56.
- (3) *Ramanandi Kuer v. Kalawati Kuer* (1928), 55 I.A. 18.
- (4) *Kashi Chundra Deb v. Gopi Krishna Deb* (1892), 19 Cal. 48.
- (5) *In re Ivory Hankin v. Turner* (1878), 10 Ch. 372.
- (6) *Pannalal and Others v. Hansraj Gupta and Others* (1940), A.I.R. Cal. 236.
- (7) *Kailash Chandra v. Nanda Kumar* (1944), A.I.R. Cal. 385.

Judgement

Edmonds J: This is an interlocutory application by way of notice of motion for the revocation of the grant of letters of administration to the respondent in the estate of one Fatuma binti Swaleh bin Awadh. The application is contested on a number of grounds, only two of which by consent of counsel for the parties have at this stage been argued. These two grounds are stated in the respondent's affidavit to be as follows:

- "1. That a grant of letters of administration cannot be revoked compulsorily by the applicant, even were he an heir, which is not admitted, by way of notice of motion but only by action."
- "2. That the applicant is not an heir of the deceased entitled to the grant and cannot bring an application to revoke the said grant until he has established that he is an heir either by way of action or originating summons."

The application now before me is taken by way of notice of motion in the original probate and administration cause whereunder the respondent on July 26, 1946, petitioned the court for a grant of letters of administration to him in the estate of the deceased and whereunder letters of administration were duly granted to him. It is contended for the respondent that the applicant's proper procedure for the revocation of the grant is by originating action, and not by way of motion. The practice in this colony in regard to matters of probate is governed by the Indian Probate and Administration Act of 1881, and I think it may be said that where that Act is silent as to procedure, the procedure obtaining in England, if not in conflict with the Civil Procedure Ordinance, should be applied. Provision for revocation of the grant of probate or letters of administration in India is made by s. 50 of the Act of 1881 and in Kinney's Commentary on the Act (2nd Edn.), no specific procedure is set out by the learned author, who does no more than refer to the methods obtaining in England, namely, by motion and by action. In Tristram and Coote's Probate Practice (19th Edn.), it is stated at p. 336 that:

"A grant may be revoked by decree in an action for revocation; by order of a judge made on motion; by order of a registrar on the application of, or with the consent of, the grantee; or under R. 115 P.R. and R. 108 D.R."

and that according to the rules and procedure of the Probate Division, certain applications should or may be made on motion to the court, among which (at p. 430) is included an application for revocation of a grant, except:

"where a grantee, having been cited to bring in the grant, resists the revocation, when an action becomes

necessary”.

At p. 472 reference is made to “Actions for revocations of grants” and the following commentary appears at the foot of that page:

“In an action either for the revocation of probate, or for the revocation of letters of administration, the party objecting to the grant must call it in by a citation, and should allege in the endorsement of his claim on the writ

of summons, and in his statement of claim, the ground for revoking the grant . . . ”

In Halsbury’s Laws of England (3rd Edn.), Vol. 16, p. 275, para. 518 it is stated that:

“Revocation may be obtained either voluntarily or by compulsory proceedings. In the former case evidence is filed setting out the circumstances, and the order may be made on motion or by a registrar. In the latter case a writ is issued, and a citation is served upon the grantee requiring him to bring the grant into the principal registry, and show cause why it should not be revoked. The citation must either precede or be simultaneous with the writ, and the plaintiff should allege in the endorsement of his claim on the writ and in his statement of claim, as the ground for revoking the grant, the invalidity of the will or the defendant’s want of interest . . . ”

Similarly, in The Annual Practice, 1961, it is stated at p. 8 that revocation actions:

“These arise after a grant has been made in common form on such ground as the alleged invalidity of the will, or that the person who has obtained the grant is not entitled to it . . . A citation to bring in the grant must issue before, or simultaneously with, the writ . . . ”

and that:

“Where it appears to the court that a probate or administration either ought not to have been granted or contains an error, the court may call in the probate or administration and, if satisfied that it would be revoked at the instance of a party interested, may revoke it. If it cannot be called in, it may be revoked without being called in.”

Under the English practice, therefore, it is clear to me that a grant may be revoked by the court either suo moto or upon motion where the revocation is not opposed, or by action where it is opposed. The Indian Succession Act of 1925 has not been applied to this Colony, but it is of interest to note the procedure set out in Paruck’s Commentary on the Act (3rd Edn.) at p. 458. There the learned author states that:

“A petition to revoke grant must be made to the court which granted the probate and the application is by way of petition and not by notice of motion. On receipt of the petition, the court shall give notice to the executor and all persons interested in the will or claiming to have any interest in the estate of the deceased. The executor will be the plaintiff and the applicant will be the defendant . . . ”

It would therefore appear from the above authorities that the proper procedure in this colony where revocation is sought but is opposed by the grantee is by action and not by motion. The applicant now before me, however, contends the opposite and his advocate has referred me to a number of cases which he maintains support his contention that procedure by way of motion is proper. He refers me to *Sardar Khan v. Gulam Fatuma and the Public Trustee* (1) (1931), 13 K.L.R. 36, and *In the estate of Sukhlal s/o Madhulal* (2) (1949), 23 K.L.R. (Pt. 2) 56, in both of which cases applications for revocation of grant were made by motion and no exception taken to this procedure. However, in neither of these cases was the procedure by motion put in issue, and they are therefore no authority in support of this applicant’s contention that the procedure was specifically approved by the court, or is correct. His advocate then drew attention to a number of Indian cases. The first was *Ramanandi Kuer v.*

Kalawati Kuer (3) (1928), 55 I.A. 18, which is a report of an appeal to the judicial committee of the Privy Council. Although in the rubric reference is made to “an application under s. 50 of the Act of 1881 to revoke a grant of probate,” it is clear from the report that the application had been made by way of petition and not by motion. Similarly, in the case of *Kashi Chundra Deb v. Gopi Krishna Deb* (4) (1892), 19 Cal. 48, the application for revocation was made by petition, that is to say, by an originating action. In the case of *In re Ivory Hankin v. Turner* (5) (1878), 10 Ch. 372, the report is in connection with an interlocutory application on motion in an action brought for revocation and is thus no support for the applicant’s present contention. The other two cases brought to my notice were *Pannalal and Others v. Hansraj Gupta and Others* (6) (1940), A.I.R. Cal. 236 and *Kailash Chandra v. Nanda Kumar* (7) (1944), A.I.R. Cal. 385. Both these cases concerned the Indian Succession Act, 1925, and in both it was held that the proper procedure for a party who seeks revocation of a grant of probate is to apply to the Probate Court under s. 263, and not to file a civil action. It is contended for the applicant that this indicates that the procedure must be by way of motion. It is clear, however, that the applicant’s advocate is confused as to the meaning and implication of the word “application”, and that he considers that the word implies “application by motion”. That, of course, is not the case and one has recourse again to Paruck’s Commentary on s. 263 of the Act of 1925 where at p. 458 he states:

“The power conferred by this section to revoke the grant is discretionary even if a case of ‘just cause’ is made out and the procedure for an application for revocation is by petition under this section. As to whether a civil suit can lie to revoke the grant the decisions are conflicting but the recent and correct view adopted by the courts is that no suit will lie to revoke the grant. In *Harris v. Spencer* the Bombay High Court held that a civil suit can lie to revoke grant under this section. But the same court has in *Narbheram v. Jevallabh* held that the correct procedure for revocation of the grant of probate is by a petition on the testamentary side of the court and not by a suit on the original side. In this case a suit was filed on the original side to revoke probate but the suit was stayed and the plaintiff was ordered to apply by petition on the testamentary side to revoke probate. The Calcutta High Court has also held that no civil suit will lie to revoke grant on any ground and that the exclusive remedy is by an application to the Probate Court under this section and not by suit.”

There then follows the passage which I have already quoted, namely:

“A petition to revoke grant must be made to the court which granted the probate and the application is by way of petition and not by notice of motion . . . ”

I think it is clear therefore that both in England and in India proceedings for the revocation of a grant where the grantee opposes is by way of an originating action, by a civil suit in England or by petition in India. The same principles must be followed in this colony and the application must be brought under the Civil Procedure Ordinance by originating action, that is to say, by a civil suit, by petition, or by originating summons, whichever is applicable under the Ordinance. The applicant’s present application cannot therefore be entertained and is dismissed with costs.

The second point of law taken for the respondent does not really arise now, but I will deal with it briefly. It is conceded, rightly I think, for the applicant, that an application for revocation of a grant can be made only by an heir or a creditor of the estate. But I do not think it is necessary that a person claiming to be an heir should, before making application, file a declaratory suit in order

to establish the fact. I think anyone claiming to be an heir may file an application for revocation, but of course he will at the hearing initially have to satisfy the court as to his claim to be an heir.

Application dismissed.

For the applicant:

SR Gautama

For the respondent:

JEL Bryson

For the applicant:

Advocates: *SR Gautama*, Mombasa

For the respondent:

Bryson & Todd, Mombasa

APC Lobo and another v Saleh Salim Dhiyebi and others
[1961] 1 EA 223 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	16 March 1961
Case Number:	94/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA
Appeal from:	H.M. High Court of Tanganyika—Law, J

[1] *Court of Appeal – Powers – Magistrate’s criticism of advocate’s conduct – Application to expunge parts of judgment – Whether appellate court has power to order that parts of judgment of lower court be expunged.*

[2] *Advocate – Duty – Conduct of litigation – Duty to client and court.*

Editor’s Summary

The appellants who were farmers sued the respondents as personal representatives for Shs. 7,433/05 and interest upon the balance of an agreed account. The claim was disputed. At the trial the second and third respondents were by consent released from attendance as the respondent’s counsel stated that they were Arab women who knew nothing of the case and were sued merely as co-administrators. Evidence having been given in support of the claim the first respondent was called for the defence. He stated that neither he nor the other respondents knew anything of the case, that he had signed the defence but did not know

what was in it and that his son had dealt with the matter. The respondent's counsel then sought an adjournment to call the other two respondents, but his reason for calling the respondents, namely, to say that they had given instructions for the defence, was not made clear to the trial magistrate who refused the adjournment. The trial magistrate thereupon entered judgment for the appellants adding that the defence had been concocted without the knowledge of the respondents and filed without instructions. He also ordered that the record should be sent to the High Court for consideration by the advocates' committee. The committee decided not to take any action. On appeal by the respondents the High Court held that the trial magistrate should not have given judgment without ascertaining that the respondent's advocate had closed his case and remitted the suit to the magistrate to be continued from the stage where the defence had broken off and awarded the costs of the appeal to the respondents. Against this decision both sides appealed, each contending that the judgment of the High Court was erroneous in certain

respects. The respondents also took strong exception to remarks made by the trial magistrate and the judge of the High Court regarding the conduct of the respondents' case before the trial magistrate and asked that certain passages be expunged from both the magistrate's ruling and the judgment.

Held –

- (i) the case should be remitted for trial de novo.
- (ii) the judgment of the High Court was quite adequate to clear the advocate concerned of any imputation of concocting the defence and there was no occasion to expunge the passages objected to in the ruling of the trial magistrate.
- (iii) it is not settled that the Court of Appeal has power to direct that a passage or passages in the judgment of a lower court should be expunged though, of course, the court is free to comment on any such passage, and if necessary, to disagree and to express an opinion that such a passage is unjustified.
- (iv) in the instant case it was unnecessary to decide whether there was power to expunge because, even assuming that such power existed, this was not a case in which it should be exercised.
- (v) an advocate who appears for a client in a contested case is retained to advance or defend his client's case and not his own; this he must do strictly upon instructions and with a scrupulous regard, as an officer of the court, for his duty to the court as well as to his client.

Case remitted for trial de novo before another magistrate.

Cases referred to:

- (1) *Radhakrishen M. Khemaney v. Lachabai Murlidhar*, [1960] E.A. 1 (P.C.).
- (2) *Brown v. Dean*, [1910] A.C. 373.
- (3) *Latchu v. Emperor* (1914), A.I.R. Oudh. 171.
- (4) *Secretary of State v. Ghulam Nabi* (1933), A.I.R. Lah. 711.

Judgment

The following judgment prepared by **Sir Kenneth O'Connor P:** was read by direction of the court:

The appellants are Goan farmers trading as Helvetia Dairy. The respondents are the personal representatives of Ali Salim Dhiyebi deceased (hereinafter called "Dhiyebi"). The appellants sued the respondents in the district court of Dar-es-Salaam. They alleged that, pursuant to an oral agreement between Dhiyebi and the appellants made in 1952, Dhiyebi was to have his cattle dipped every week in the dipping pond of the appellants at a specified charge per head and that up to Dhiyebi's death the appellants were owed, for these dippings, Shs. 7,433/05 and interest on a balance of an agreed account for the years 1957, 1958 and part of 1959. The appellants said that a claim for this amount had been submitted to the respondents as personal representatives of Dhiyebi, but had not been paid. The appellants claimed a total of Shs. 8,322/30 and costs.

A written statement of defence, verified by the respondents, was filed and served on the plaintiffs' advocates. In this defence limitation and various points of law were pleaded. The defendants put the

plaintiffs to strict proof of their claim and it was further pleaded that during 1955 and 1956 Dhiyebi had sold and delivered chippings to the plaintiffs to a value of Shs. 4,447/- and that it had been agreed that this amount should be set off against the dipping charges. The defendants alleged that accounts had been taken and settled between them and Dhiyebi and that, to the best of the defendants' knowledge, nothing was outstanding. They denied that they were indebted to the plaintiffs as alleged in the plaint or at all.

A reply was filed in which *inter alia* the plaintiffs admitted having purchased chippings, but said that they had claims in excess of the amount owed for chippings and that, in any event, the claim for chippings was barred by limitation, and they denied that there had been a settled account between the defendants and Dhiyebi.

When the case came up for hearing in the district court, there was a legal argument on the question whether the alleged agreement to set off the price of chippings against the dipping fees was maintainable. The court refused to decide this as a preliminary point. There follows an entry:

“By Consent–Defendants Nos. 2 and 3 may be released”. According to a later statement by the learned resident magistrate the defendants were released because Mr. Harjit Singh, the learned counsel who appeared for the defendants (the present respondents) said that they were both Arab women who knew nothing of the case but had merely been sued as co-administrators.

Lobo, the managing partner of the Helvetia Dairy then gave evidence in support of the plaintiffs’ claim. He was cross-examined and re-examined. Lobo’s evidence was supported by that of one Nyangusi, an employee, who used to dip Dhiyebi’s cows weekly.

The plaintiff’s case was then closed.

The next entry in the record is:

“Singh Calls: Saleh Salim Dhiyebi, Arab, Moslem, affirmed states:

I am the first defendant and one of the administrators of the estate of the late Ali Salim Dhiyebi. I am sued in that capacity. The other two defendants are my co-administrators.

I deny the plaintiff’s claim against the estate, and I do not know anything about the matter.

XXD by Dharani: I do not know whether the debt is true or not. My son deals with the matter. I know nothing of it. I have my own business. Even before my brother died I had nothing to do with his affairs. The other two defendants do not know anything about this matter either. They are merely administrators.

I have signed the defence but I do not know what is in it. The defence was just given to me—they told me to sign it—I had no idea what was in it.

The other two defendants also had no idea what was in the defence—they just put their thumbprints on because they were told to do so.

Re XN. by Singh: I have no idea how much the plaintiff is claiming for dipping charges. I signed the defence, but I did not know it was a defence. I know nothing of the matter.

To Court: I was just called to court. I did not even know what the case was going to be about. I merely came here thinking I would hear the outcome of the claim which I had heard was pending. I did not know who the plaintiff was. I merely followed my advocate to court.

Sgd. N. A. P. Methven, R.M.

Singh: I ask that defendant may be examined to refresh his memory as to the contents of the pleadings.

Court: Although the defendants are sued only in a representative capacity, nevertheless once a summons is served on them it behoves them to take action to defend the suit and to acquaint themselves with the ground of defence. They may rely on the evidence of other people, but the statement of defence is their’s.

Witness recalled.

To Court: My son dealt with all the affairs of my brother’s estate. I did not know a summons had been served. I see the summons now shown

to me by the court. It does not bear my signature. I do not know if the signature is my son's—I only read and write Arabic.

He never told me that a summons had been brought for me. Nor did I see the plaint. No one ever explained to me what the claim was.

I did not intend to say I did not admit the claim of the plaintiff. What I meant was that I knew nothing about it. I have had no dealings with my brother's estate since he died.

Sgd. N. A. P. Methven, R.M.

Singh: I ask that the other two defendants be allowed to attend and give evidence. The decree will be against the P.R.'s. The court may make such order as the justice of the case requires. This is a proper case for the exercise of that discretion. The other defendants were present in court and were released with the consent of the plaintiff at their own and my request because their presence was not thought to be necessary.

I therefore ask for adjournment to call other two defendants to examine them.”

Mr. Dharani for the plaintiffs objected to the adjournment. He said, *inter alia*:

“If the defendants know nothing—do not even know what their line of defence is, how can they be allowed now to call witnesses to prove that ‘defence’?”

The learned resident magistrate then wrote what the parties assumed to be a ruling on the application for an adjournment to call the second and third defendants. The learned resident magistrate read out what he had written. He first refused the adjournment on the ground that defence counsel had asked for the release of the second and third defendants because they were Arab women who knew nothing of the case but had merely been sued as co-administrators of the first defendant who was said to be an active administrator; the first defendant, however, had now said that, though he had signed the defence he had no idea what it contained and that co-administrators knew no more than he did. The resident magistrate held that to recall the second and third defendants would be purposeless and unwarranted.

It was explained in the High Court and before us that Mr. Harjit Singh's object in asking for the second and third defendants to be called was to re-establish the defence by evidence from them that they had in fact given him instructions for it and knew what was in it and that the evidence of the first defendant on this point was wrong. This reason for the recall of the first and second defendants does not seem to have been made clear to the resident magistrate. The learned resident magistrate did not confine himself to refusing the application for adjournment, which was all that it was appropriate to deal with at that stage; but went on to dispose of the case. Having pointed out that the defence had been served, he continued:

“But they have come here and said that they cannot deny the claim and know nothing of the grounds of the defence. It is impossible in such a position for counsel for defence now to call evidence from other sources to support a defence which his own clients admit has been concocted without the knowledge of the defendants and which the defendants are unable in any way to support.”

The learned resident magistrate went on to say that possibly some other person had intermeddled with the estate and dealt with the day to day business; if so the administrators should have enquired the grounds of any defence to the action, and continued:

“They have done nothing and know nothing and when they say ‘I cannot deny the claim. I know nothing about it’, and go on to say that they do not even know what is the claim or the defence we are really in a position where there has been default in the defence. Evidence cannot be called to support something which does not exist. There never were instructions from the defendants to file a defence or to defend the suit.

“I therefore refuse the defence application for adjournment. I also declare that there is in fact no defence on which to proceed. It is a case where I could have allowed *ex parte* proof. The plaintiff has made out a good *prima facie* case. I accordingly enter judgment for the plaintiff as prayed.”

By saying that the defence had been concocted without the knowledge of the defendants and filed without instructions, the learned resident magistrate made a serious accusation against the professional conduct of the defendant’s advocate Mr. Harjit Singh. That the learned resident magistrate thought that professional misconduct had been committed is shown by the fact that he made an order that a copy of the relevant part of the proceedings should be forwarded to the High Court for consideration of the question whether or not action should be taken by the advocates’ committee or otherwise. It was correct if the learned resident magistrate thought that the professional misconduct had, or might have, been committed to forward the matter for reference to the advocates’ committee. We were informed that the committee had since considered the matter and had concluded that further action by it was not necessary. Serious objection was taken in the High Court and before us on behalf of the advocate concerned to the learned resident magistrate finding that the defence had been concocted without having heard on this point two out of the three defendants or the advocate concerned. The learned resident magistrate’s remarks might have been differently worded if Mr. Harjit Singh had explained, when he made the application to call the second and third defendants, that the object was to establish that the defence had been prepared upon their instructions. We think that the learned resident magistrate was justified, on the information before him, in refusing the application for an adjournment; but that he should not have given judgment in the case without ascertaining that Mr. Harjit Singh had closed his case and without hearing him if he wished to be heard. This is the view which was taken by the High Court on appeal to that court.

The High Court remitted the suit to the learned magistrate to be continued from the stage where the defence broke off, that is to say from the end of the first defendant’s evidence. The High Court awarded the costs of the appeal to the present respondents who were the appellants in that appeal. Against this decision both sides appealed to this court.

The appellants allege that the learned judge was wrong in holding that the resident magistrate should have asked the defendants’ advocate whether he wished to close his case or address the court and that, in the circumstances, the learned resident magistrate was entitled to assume that he had no other witnesses; that there was no evidence that the first defendant’s son was in court to give evidence; and that the defendant’s advocate made no application to call anyone but the second and third defendants. They also said that the learned judge had erred in his award of costs. After hearing learned counsel for the appellants, we intimated that we were of opinion that the case would have to be remitted to the district court and that we desired to hear counsel for the respondents only on the question whether the trial should commence from the point where it had left off, as directed by the High Court, or whether there should be a re-trial *de novo*; and on the question of costs.

Mr. Beynon for the respondents addressed us on these points. He opposed a trial *de novo* on the ground that the plaintiffs had already had an opportunity

of presenting their case and had closed it having failed to prove the number of cattle dipped, and that it would be unfair to allow them another chance to make their case. He relied on *Radhakrishen M. Khemaney v. Lachabai Murlidhar* (1), [1960] E.A. 1 (P.C.) as to the undesirability of ordering new trials. Mr. Master, for the appellants, argued contra and informed us that the learned resident magistrate who had heard the case was no longer in Dar-es-Salaam. After considerable thought, and bearing in mind the principle laid down in *Khemaney's* case (1), and by Lord Loreburn, L.C., in *Brown v. Dean* (2), [1910] A.C. 373, we have, in the exercise of our discretion, come to the conclusion that there should be a re-trial de novo, and we so order. Counsel were able to come to an agreement regarding the costs and, accordingly, we order, by consent, that the costs in the district court should abide the order of the resident magistrate who conducts the new trial; and that each of the parties should bear his own costs of the proceedings in the High Court and of the appeal to this court.

We now turn to another matter raised by Mr. Beynon with Mr. Master's support. Mr. Beynon took strong exception to certain remarks made by the learned resident magistrate in his ruling and by the learned judge of the High Court in his judgment regarding the conduct of the case before the resident magistrate by Mr. Harjit Singh. Mr. Beynon objected to an advocate being censured without being charged or being given notice of what was alleged against him and without his explanation having been heard. He asked us to order that the passages objected to be expunged from both ruling and judgment.

As regards the ruling of the learned resident magistrate, the imputation that the defence was concocted was dealt with by the learned judge in the High Court as follows:

"The use of the word 'concocted' by the learned magistrate had the effect of a serious imputation against Mr. Harjit Singh in his professional conduct. I must make it clear that no such imputation arises in the circumstances of this case. The learned magistrate formed the view that the defence was concocted because he was under the mistaken belief that Mr. Singh was not in a position to call any evidence to support the defence. As I have said before, Mr. Singh had not closed his case. This ground of appeal succeeds, as do grounds 4 and 5. The learned magistrate was not justified in holding that there were never any instructions from the defendants to file a defence or defend the suit. Clearly Mr. Singh was instructed by the defendants to defend the suit; that is apparent from the record. As to the defence, the defendants could not give instructions as to its contents because they were ignorant of the facts, but the information contained in a defence does not necessarily come from the nominal defendants who may, as in this case, be sued merely in a representative capacity."

This is quite adequate to clear Mr. Harjit Singh of any imputation of concocting the defence and we see no necessity for expunging the passage in the ruling of the learned magistrate.

As regards the judgment of the High Court, we would here mention that the Court of Appeal for Eastern Africa is not the proper body to deal with complaints by advocates that they have been unjustly censured by judges. There is a well-known procedure for ventilating such grievances. When, however, an application is made to expunge certain remarks from a judgment, it becomes the duty of the Court of Appeal to consider whether such a jurisdiction exists and, if so, whether or not there are grounds for exercising it. There is, of course, jurisdiction to order that scandalous matter in affidavits or pleadings shall be expunged and appellate courts in India have expunged passages from the judgments of inferior courts: *Latchu v. Emperor* (3), (1914) A.I.R. Oudh 171; *Secretary of State v. Ghulam Nabi* (4) (1933), A.I.R. Lah. 711. We are by no

means sure that this court has power to direct that a passage or passages in the judgment of a High Court should be expunged, though this court would, of course, be free to comment on any such passage, and if necessary, to disagree with it and to express an opinion that it was unjustified. It is unnecessary, however, to decide whether there is power to expunge because, even assuming that such power exists, we are of opinion that the present is not a case in which it should be exercised.

Before stating our reasons for this conclusion on the facts of the present case, it may be of assistance if we endeavour to lay down some general principles which we consider should guide advocates and courts in these matters.

An advocate who appears for a client in a contested case is retained to advance or defend his client's case and not his own. This he must do strictly upon instructions and with a scrupulous regard to professional ethics. Remembering that he is an officer of the court and owes a duty to the court as well as to his client, he must never knowingly mislead the court as to the facts or the law.

A court, if it considers that an advocate, in his conduct of a client's case, has been guilty of misconduct, should find facts only in so far as is necessary to dispose of the case before it. Remembering that it is the client's case and not that of the advocate which it has heard and is called upon to decide, it should deal in the judgment with the advocate's conduct only in so far as that is necessary to the case before it, and, if the court is of opinion that a *prima facie* case of professional misconduct is disclosed, should refer the matter to the appropriate professional body for report and if necessary for adjudication by another court. That other court will be concerned with the question of the advocate's conduct and not with adjudication of the client's cause; and the advocate will then have an opportunity of explaining, if he wishes to do so, matters which appear to be prejudicial to him.

In the above remarks it has been assumed that the conduct of the advocate has not amounted to a contempt committed *ex facie* the court to which different considerations apply and which might have to be dealt with in a more summary manner.

In the present case Mr. Beynon objected in particular to the learned judge having said (as Mr. Beynon alleged) that the application made by Mr. Harjit Singh to the resident magistrate for an adjournment was frivolous and that to allow it would have amounted to an abuse of the process of the court. The learned judge did not, however, say that the application was in fact frivolous: he said that the application was on the face of it frivolous, as the court was being asked to adjourn to enable two witnesses to be called who, according to the first defendant's own admission, knew nothing about the matters in issue, and that to consent to such an application would have been to allow an abuse of the process of the court. The learned judge went on to make it plain that had it been made clear to the resident magistrate that the advocate's object in asking for the witnesses was to show that he had been properly instructed in framing the defence, this would have put another complexion on the matter. The learned judge said:

"But I am now informed that Mr. Singh's object in calling these witnesses was to make it clear that he had been properly instructed, and had not just invented a defence. Unfortunately Mr. Singh did not explain this to the learned magistrate, as is clear from the records."

Having carefully studied the passage objected to, we are of opinion that it merely imputes to the advocate an omission to make his object clear which, if done, would have removed a misconception in the mind of the learned resident magistrate and that there is nothing in it which imputes professional misconduct to Mr. Harjit Singh. The passage was germane to the questions which the

learned judge had to consider on the appeal and there would be no justification for directing it to be expunged.

The learned judge went on to point out that the resident magistrate, without informing Mr. Harjit Singh of his refusal of the adjournment and asking him whether, in the face of that ruling, he wished to close his case or to call other witnesses or address the court, proceeded to deliver judgment. The learned judge said that it was in that unsatisfactory state that the matter now came before the High Court on appeal. This was another remark to which Mr. Beynon objected as reflecting on Mr. Harjit Singh. The reflection there, however, was not upon the advocate, but upon the failure of the resident magistrate to follow the proper procedure and to assure himself that he had heard the whole of the available evidence and counsel's submissions before giving judgment. We agree with the learned judge that this was unsatisfactory; and it is precisely for this reason that we have felt impelled to direct a new trial.

Another passage which Mr. Beynon sought to have expunged was a remark by the learned judge (on p. 61 of the record) in which he commented on the fact that the first defendant was called as a witness and said:

"Why Mr. Harjit Singh saw fit to call a witness who was unable to give any relevant evidence at all passes my comprehension."

We were informed by Mr. Beynon that it was not at Mr. Harjit Singh's instance that the first defendant was called. The record of the lower court, (which the learned judge was entitled to take as correct) says "Singh calls Saleh Salim Dhiyebi". However this may be, the comment, in our opinion, was more strongly worded than was necessary, though the calling of this witness had a bearing on the question of costs. The learned judge went on to indicate that Mr. Harjit Singh should at once have called Dhiyebi's son "who was, I am informed, available at the time" and who was alleged to know something about the matter in hand. The learned judge referred again to these matters in his judgment when (on p. 66) in considering how costs should be awarded, he said:

"but the necessity for an appeal was largely due to the manner in which the appellants' case was conducted in the court below, in particular the calling of a witness who knew nothing, the failure to inform the court of the presence of a material witness, and the application for an adjournment which was so worded as to mislead the magistrate into thinking that the object of the adjournment was to enable irrelevant evidence to be led. On the other hand, the learned magistrate should not have found that there had been a default in defence, and given judgment upon that default, without ascertaining whether the defence case had in fact been closed, and without giving the defence advocate an opportunity to address the court. In all these circumstances, I think the appellants must have the costs of this appeal, and I order accordingly."

We were asked to expunge the first part of this passage and we were informed that there was no evidence that Dhiyebi's son was in court, and available to be called. The learned judge has, however, recorded that he was informed that Dhiyebi's son was available. Assuming that this information was correct, it might or might not have been to the advantage of Mr. Harjit Singh's clients to call this witness. That is a matter which must be left to the advocate, though an adverse inference may be drawn by the court if a material witness who could be called is not called. It seems to have been suggested to the learned judge that the defendants were deprived of an opportunity of calling this witness. If so, and if they desired to call him, we do not know why the magistrate was not informed (even after his ruling) that he was available and had not been heard. The learned judge was justified in taking this into consideration on the question of costs. Clearly, as the learned judge awarded costs to the appellants

(the present respondents), he did not consider any of the matters which he set out sufficiently serious to justify depriving them of the whole or any part of the costs. Mr. Beynon took particular exception to the passage:

“which was so worded as to mislead the magistrate into thinking that the object of the adjournment was to enable irrelevant evidence to be led.”

We have already dealt with this suggestion. It is clear from the judgment as a whole that no imputation of a deliberate intention to mislead was made against Mr. Harjit Singh.

In our opinion, the judgment of the High Court as a whole does not impute professional misconduct to Mr. Harjit Singh: all the passages of which complaint is made (with the exception of the comment upon the calling of the first defendant as a witness) were germane and necessary matters which the learned judge had to decide. We do not feel that we should be at all justified in ordering any part of the judgment to be expunged.

The matter will be remitted to the resident magistrate’s court for trial de novo before another resident magistrate and there will be a consent order for costs as already indicated.

Case remitted for trial de novo before another magistrate.

For the appellants:

KA Master QC and HR Dharani

For the respondents:

AC Beynon and Harjit Singh

For the appellant:

Advocates: *H Dharani & Co*, Dar-es-Salaam

For the respondents:

Harjit Singh, Dar-es-Salaam

Credit Finance Corporation Ltd v Harcharan Singh Ranbutta [1961] 1 EA 231 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 January 1961
Case Number:	24/1960
Before:	Sir Alastair Forbes V-P, Gould JA and Connell J
Appeal from:	H.M. Supreme Court of Kenya—Miles, J

[1] *Hire-purchase – Failure to pay instalments – Repossession of vehicle – Plaintiff claiming all*

remaining instalments under agreement – Whether claim is for damages or unpaid instalments – Indian Contract Act, 1872, s. 73.

Editor's Summary

By a hire-purchase agreement under which the respondent agreed to take on hire from the appellant an Austin motor lorry, there was provision for deposit of Shs. 4,000/- and eleven monthly instalments after payment of which the respondent had the option to purchase the vehicle for Shs. 20/- but until the option was exercised the vehicle remained the absolute property of the appellant. By cl. 4 the appellant had the right to terminate the hiring and repossess the vehicle upon default (*inter alia*), in any payment of the hire rental without prejudice to its claim for arrears of monthly rentals . . . or for damages for breach of the agreement. The respondent paid the deposit and two instalments but defaulted in the payments due in October, November and December, 1957, and January, 1958, whereupon in January, 1958, the appellants repossessed the vehicle and later sold it for Shs. 3,000/-. The appellant then brought an action in the Supreme Court claiming in the plaint Shs. 4,620/- made up of all the instalments with interest and seizure charges less the sums paid and received

on the sale of the car. Counsel for the appellant argued at the trial that the claim was in effect one for damages for breach of contract and that the sum claimed was due under the agreement. The respondent disputed the claim and alleged that it was not in accordance with the agreement. The trial judge dismissed the action holding that the claim was based on the erroneous assumption that the respondent was legally liable to buy the vehicle. The appellant thereupon appealed and again relied on the argument that his action was one for damages for breach of contract but finally asked the court if it were against him on his main argument, for leave to amend his pleadings so as to claim the four instalments overdue when the vehicle was seized.

Held –

- (i) the law to be applied was the law of contract under the Indian Contract Act and at common law; none of the English statute law on the subject of hire-purchase was in force in Kenya.
- (ii) when the appellant seized the vehicle the hiring was terminated and therefore any contractual right to sue for instalments of hire falling due after the date of seizure also terminated; it did not, however, determine the agreement as distinct from the hiring.
- (iii) the trial judge rightly held that the appellant's claim was based on the footing that there had been a sale on credit and on the footing that the respondent was legally bound to purchase the vehicle, which resulted in the real measure of damages being obscured.
- (iv) in the interests of justice the appellant's application to amend its pleadings would be allowed, but in view of the wording of the plaint it would not be necessary to formulate a specific amendment.

Appeal allowed in part. Appellant to pay the respondent's costs in the court below and half the respondent's costs of the appeal.

Cases referred to:

- (1) *Wallis, Son and Wells v. Pratt and Haynes*, [1910] 2 K.B. 1003; [1911] A.C. 394.
- (2) *Elsey & Co. Ltd. v. Hyde*, (unreported) quoted in *Cooden Engineering Co. Ltd. v. Stanford*, [1952] 2 All E.R. 915.
- (3) *Cooden Engineering Co. Ltd. v. Stanford*, [1952] 2 All E.R. 915.
- (4) *British Stamp and Automatic Delivery Co. Ltd. v. Haynes*, [1921] I.K.B. 377.
- (5) *Inter-office Telephones Ltd. v. Robert Freeman Co. Ltd.*, [1957] 2 All E.R. 479.
- (6) *Charter v. Sullivan*, [1957] 1 All E.R. 809.
- (7) *Landom Trust Ltd. v. Hurrell*, [1955] 1 All E.R. 839.
- (8) *United Dominions Trust (Commercial) v. Scott-Bowen* (1957), 73 Sh. Ct. Rep. 293.

January 3. The following judgments were read:

Judgment

Gould JA: This is an appeal from a decree of the Supreme Court dismissing with costs a suit brought by the appellant company (hereinafter called "the appellant") against the respondent and based on a

hire-purchase agreement dated July 8, 1957.

By the agreement in question the appellant agreed to let and the respondent to hire an Austin motor lorry; there was a provision for payment of “an initial payment” of Shs. 4,000/- and for the payment of “Hire Rentals” by eleven monthly payments of Shs. 734/- and one of Shs. 754/- commencing on August 8,

1957. The respondent had the right to terminate the hiring at any time by giving notice in writing and by returning the vehicle in good order, repair and condition; he also had an option to purchase the vehicle for Shs. 20/- when he had paid the instalments above-mentioned. The appellant had the right to terminate the hiring and re-take possession of the vehicle upon default (inter alia) in any payment of the hire rental, without prejudice to its claim for “arrears of monthly rentals”. It was provided that the vehicle should remain the absolute property of the appellant until all the moneys payable by the respondent had been paid and the option to purchase exercised. Clause 4 and cl. 6 of the agreement were as follows:

“4. If the hirer

- (i) shall make default in the due or punctual payment of any of the hire rentals or of any sum of money payable to the owners hereunder, or any part thereof; or
- (ii) shall commit any breach of this agreement or any part thereof or suffer the same to be committed; or
- (iii) shall do or allow to be done any act or thing which may prejudice or jeopardise the owner’s property or rights in the said vehicle; or
- (iv) shall permit any judgment against him to remain unsatisfied

then on the happening of any such event, without prejudice to their claim for arrears of monthly rentals or payment of interest or other sums due or for damages for breach of this agreement, the owners may immediately terminate the hiring and they shall thereupon without previous notice or demand (and notwithstanding that they may have waived some previous default on the part of the hirer) become entitled to the immediate possession of the said vehicle and to retake and resume possession of the same and the hirer shall thereupon no longer be in possession of the vehicle with the consent of the owners.”

“6. In the event of the hirer returning the vehicle under cl. 3 (a) or in the event of the owners retaking possession of the vehicle under cl. 4 or cl. 5 hereof, the hirer shall be liable to pay to the owners:

- (a) all arrears of rent, including apportioned rent for any broken period, all interest thereon and all sums due and payable up to the date of the receipt of the vehicle by the owners;
- (b) the cost of all repairs required to render the vehicle in good order and condition; and
- (c) by way of agreed depreciation of the vehicle, the difference between three-quarters of the total hire-purchase price payable under this agreement and the total of the sums already paid and the moneys due to the owners for hire rental at the date of the receipt of the vehicle by them.”

It is common ground that the respondent paid the “initial payment” and two instalments. He defaulted in payment of the instalments payable on the eighth days of the months of October, November and December, 1957, and January, 1958, and the appellant repossessed the vehicle on January 19, 1958. It was later sold by the appellant for Shs. 3,000/-.

At the trial it was the submission of counsel for the respondent, having regard to the pleadings, that the claim was misconceived and that the plaint was not based on the hire-purchase agreement. It will therefore be necessary to set out the relevant portions of the pleadings. The plaint read:

“1. The plaintiff’s claim is for Shs. 4,620/- due from the defendant to

the plaintiff under a hire-purchase agreement in writing dated July 8, 1957, made between the plaintiff and the defendant at Nairobi in connection with motor vehicle, Austin, KFC. 375, as per the statement attached hereto marked 'A'.

- "2. In breach of the terms of the said agreement, the defendant has failed to pay the instalments due thereunder and there is due from the defendant to the plaintiff the said sum of Shs. 4,620/-. The plaintiff craves leave to refer to the said hire-purchase agreement at the hearing of this case.
- "3. Despite demand, the defendant refuses and/or neglects to pay the said sum or any part thereof.
- "4. The cause of action in this suit arose at Nairobi within the jurisdiction of this honourable court.

"Wherefore the plaintiff claims:

- (a) Shs. 4,620/-.
- (b) Interest at court rates.
- (c) Costs together with interest thereon at court rates."

The statement marked "A" above referred to was as follows:

"Dr. to: Credit Finance Corporation Ltd.

P.O. Box 302, Nairobi,
Kenya Colony.

August 20, 1958

Mr. Harcharan Singh Ranautta.

P.O. Box 5812, Nairobi.

1957.

July 9	To Mohinder Singh	Shs. 12,000.00
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July 9	To Interest	828.00
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1957

July 10	By Cash—Deposit to C.F.C.	Shs. 4,000.00
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Nov. 14	To Add Interest	80.00
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Nov. 12	By Cash	814.00
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Nov. 22	By Cash	734.00
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1958

Jan. 21	To Ainsworths—Seizure.....	160.00
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Feb. 20	To Ainsworths.....	100.00
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Mar. 15	By Cash	3,000.00
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Mar. 18	To Cheque.....	3,000.00
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Mar. 22	By Cash (By sale of vehicle)	3,000.00
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	By Balance	4,620.00
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Shs.	Shs.
16,168.00	16,168.00

To Balance	Shs.	
	4,620.00"	

It is admitted that there are two minor errors in that statement and that the amount which it was intended to claim was Shs. 4,484/-. These matters are immaterial for present purposes, for it is common ground that the intention was to claim the total price of the vehicle, including all of the instalments, with interest and seizure charges, less the amount already paid and the amount received by the appellant on the sale of the vehicle.

It will be sufficient to set out paras. 2, 4 and 6 of the written statement of defence which read:

- “2. The defendant denies that the amount claimed is in accordance with the terms of the hire-purchase agreement or that the particulars attached with the plaint are in accordance with the provisions of the said agreement.
- “4. The defendant denies that the plaintiff is entitled to claim from him, the defendant, the difference in the purchase price of the vehicle and the proceeds realised by auction sale as is claimed in the said statement of particulars.
- “6. The defendant denies that a sum of Shs. 4,620/- is due from him in respect of arrears of instalments as alleged in the second paragraph of the plaint and further states that the said statement of particulars does not support this allegation.”

The findings of the learned judge are set out in the following passage of his judgment:

“Mr. Hunter contends that the plaintiffs’ claim is in effect one for damages for breach of contract. I must confess that I find it extremely difficult to construe the claim in this manner. There is no reference in the body of the plaint or in the prayer to a claim for damages. Paragraph 2 of the plaint does, it is true, mention a breach of the agreement, but the only breach alleged is a failure to pay the rental. Paragraph 1, however, states ‘the claim is for Shs. 4,620/- due from the defendant to the plaintiffs *under a hire-purchase agreement* in writing dated July 8, 1957.’

“I doubt whether a failure to pay rentals gives right to a claim for damages. In my opinion the plaintiffs’ remedy is to proceed under cl. 6. It is true that cl. 4 saves the owner’s right to claim damages in the event of his re-taking possession, but I think this must refer to claims in respect of other breaches of the agreement, such as claims 2 (*d*) and (*k*). I do not think that an owner has a right of action for damages solely for failure on the part of the hirer to pay the monthly instalments. It seems to me that the fallacy of Mr. Hunter’s argument lies in the fact that in the particulars annexed to the plaint the defendant has been debited with the sum of Shs. 12,000/- which represents the total price of the vehicle. The plaintiffs’ claim, therefore, is based upon the erroneous assumption that the defendant was legally bound to purchase it. Under a hire-purchase agreement, however, the hirer always has the right to terminate the hiring. In this case the right is expressly conferred upon the defendant by cl. 3 (*a*). He is not bound to purchase the vehicle; he only has an option to do so.

“The plaintiffs’ claim as framed in the plaint and particulars is clearly based upon the footing that there was a sale on credit as Mr. Bhandari rightly contends. The claim is misconceived.”

Before this court counsel for the appellant again relied upon an argument that his action was one for damages for breach of contract, and that the particulars annexed to the plaint showed only how the loss to the appellant was computed. I think that the best initial approach to this problem lies in ascertaining just what the rights of the appellant were at the date of institution of the suit. It is necessary to bear in mind that none of the English statute law on the subject of hire-purchase, which was first enacted in 1938, is in force in Kenya. The law to be applied is the law of contract under the Indian Contract Act and at common law; the Indian Contract Act, as in force in Kenya, makes no specific reference to hire-purchase contracts, and s. 73, relating to damages for breach of contract, follows the English law. It is said in the Indian Contract and Specific Relief Acts by Pollock and Mulla (8th Edn.) at p. 460:

“The intention was plainly to affirm the rule of the common law as

laid down by the Court of Exchequer in the leading case of *Hadley v. Baxendale*, now more than eighty-five years ago.”

The English common law authorities are therefore relevant.

The hire-purchase agreement in question is one of the type in which there is a bailment of the chattel determinable by the bailee at any time, and coupled with an option to purchase the chattel for a nominal amount upon due payment of all the hire rental stipulated for. The respondent made default in payment of the hire rental and in exercise of power conferred by cl. 4 of the agreement the appellant took possession of the motor vehicle: that amounted, in terms of cl. 4, to a termination of the hiring, and therefore determined any contractual right to sue for any instalments of hire falling due after the date of seizure. It did not, however, determine the agreement as distinct from the hiring as would have been the case upon the happening of one of the events enumerated in cl. 5. That clause provides that in such case

“this agreement and the hiring hereby constituted shall, forthwith and for all purposes, be determined absolutely and come to an end and neither party shall have any right hereunder.”

That position, however, did not arise, and as I have said, only the hiring was terminated. It is necessary therefore to have regard to the agreement to ascertain what rights survived.

Clause 4, under which the motor vehicle was repossessed, is expressed to be without prejudice to the claim of the appellants for arrears of monthly rentals and other moneys due, “or for damages for breach of this agreement”. Clause 6 has already been set out; it gives a contractual right to sue for arrears of rent and other outstanding moneys, the cost of repairs, and an agreed sum for depreciation. The ambit of cl. 6 is such that it covers virtually the whole field of what might fall under the head of “damages”, but, particularly as the right to claim damages is saved by cl. 4, the inclusion of cl. 6 in the contract does not oust the right to claim damages generally instead of proceeding to enforce that clause. As Fletcher Moulton, L.J., said in *Wallis, Son and Wells v. Pratt and Haynes* (1), [1910] 2 K.B. 1003 at 1016 (in a judgment expressly approved by the House of Lords on appeal, reported at (1911) A.C. 394):

“It would require express language in any contract to indicate any intention of negating a right to damages for the breach of an obligation imposed by it, and I can find in the present contract no trace of any such language.”

In the circumstances of this case I need say nothing as to the position which might arise if a defendant sought to limit his liability to damages by reliance upon a contractual clause; that has not occurred in this case.

Accepting, as I do, that it was open to the appellant to claim damages for breach of contract, it is necessary next to examine counsel’s contention that he has done so. There is no reference whatever to damages in the plaint. The use of the words “due . . . under a hire-purchase agreement” in para. 1 thereof is consistent with a contractual claim, and not one for damages for breach of contract. Paragraph 2 reads as if the claim were one for arrears of instalments, and only by reference to the amount claimed, and the statement annexed in support thereof, can it be deduced that the claim is not intended to be one to enforce contractual rights. Counsel for the appellant contended that the particulars given showed that the action was one for damages—the appellant was claiming reimbursement of his loss. I do not think that a defendant should be called upon to make deductions of this kind, more especially where, as in the present case, the particulars given are inappropriate in relation to damage

arising from the breach of the agreement in question. The learned judge held, rightly in my opinion, that the claim was based on the footing that there had been a sale on credit and on the footing that the respondent was legally bound to purchase the vehicle. This was misleading and resulted in the real measure of damages (accepting for the purpose of argument that the action was one for the recovery of damages) being obscured.

Though there are a number of reported cases in which questions arising out of clauses similar to cl. 6 of the present agreement have been litigated, there is little direct authority upon the appropriate measure of damages at common law for breach of such an agreement. There was a judgment of Salter, J., in *Elsey & Co. Ltd. v. Hyde* (2), (unreported) portions of which were quoted in *Cooden Engineering Co. Ltd. v. Stanford* (3), [1952] 2 All E.R. 915; I will set out one portion quoted by Jenkins, L.J., at pp. 923–924:

“Then there is a third case I take, and that is this one, where the hire is determined by the owner, because the hirer is in arrear with his payments. It is proved that this is a breach of this contract, and it is proved that that breach, apart from any termination of the hire, would give the owner a right to damages against the hirer. But what would those damages be? They would be interest on the amount unpaid and nothing more. The fact that the hirer is in arrear with his payments will not entitle the owner to any damages for depreciation of these things. The reason that they have suffered is that they have second-hand goods put on their hands before they have received very much money in respect of them. That is not the result of the hirer’s breach of contract, in being late in his payments, it is the result of their own election to determine the hiring, and it appears to me, even in this case, there is no question of penalty at all, and there is no question whether the sum paid shall be regarded as liquidated damages or a penalty.”

What damages any party would be entitled to, must depend upon the particular agreement and the particular breach and the passage quoted would not provide a full description of the damages recoverable (if properly claimed) in the present action. Jenkins, L.J., commented, at p. 924:

“It should be noted that Salter, J.’s reasoning on his ‘third case’ is to some extent based on the description of the sum payable as ‘compensation for depreciation of the said article’, a consideration obviously quite irrelevant to the breach of contract constituted by the hirer’s being in arrear with his instalments and to such damages (if any) as might be said to flow from that breach.”

In Halsbury’s Laws of England (3rd Edn.) Vol. 19 at p. 545 the position at common law is considered with relation to the provisions usually inserted in hire-purchase agreements. Note (p) at pp. 545–546 reads:

“(p) The effect of such provisions is to make the general rule as to bailments applicable in the event of such breach.”

That has reference to resumption of possession rather than damages but it appears logical, where a hiring has been terminated before the arrival of the “option to purchase” stage, that the general approach should be based on bailment. For a number of years the measure of damages for breach of contract of bailment appears to have been that laid down in *British Stamp and Automatic Delivery Co. v. Haynes* (4), [1921] 1 K.B. 377, as being (with other expenses) the equivalent of the rental due from the date of the default until the expiration of a period reasonably required to let out the chattels again on hire. The Court of Appeal in *Inter-office Telephones Ltd. v. Robert Freeman Co. Ltd.* (5), [1957]

3 All E.R. 479, disapproved the decision in *British Automatic Co. v. Haynes* (4), and arrived at a result expressed in the headnote as follows:

“Held: since the owners’ loss would not be diminished by a re-hiring of the apparatus (they having enough plant to satisfy all demands without recourse to this apparatus), the measure of damages was the loss of rental for the unexpired term of the hiring, less appropriate deductions, so that the owners should be placed so far as possible in the same position as if the contract had been performed by the hirers, there being no difference in the principle applicable between a contract for sale and a contract for hiring; accordingly the damages should be computed on the basis put forward by the owners.”

There are at least two distinctions to be drawn between that case and the present one. The first is that the decision turned on the fact that the owners had stock to satisfy all market demands without recourse to the apparatus in question. That position might be reversed, as it was in *Charter v. Sullivan* (6), [1957] 1 All E.R. 809 (a case of an agreement to sell a motor car) where the demand for cars exceeded the supply and only nominal damages were given. No such question was, of course, investigated in the present case in which the vehicle concerned was in fact second-hand. The second and vital distinction is that *Inter-Office Telephones Ltd. v. Robert Freeman Co. Ltd.* (5), was a case of pure hiring and the agreement contained no clause giving the hirer the right to terminate the hiring at any time. In my view such a provision is bound to have a substantial effect upon the decision of the question what damages were in the contemplation of the parties to the agreement. In note (c) at p. 514 of Halsbury’s Laws of England (2nd Edn.) Vol. 16 the effect of the decision in *British Automatic Co. v. Haynes* (4), is stated. The note concludes:

“In cases where the hirer has the right at any time to return the goods to the owner, it is suggested that item (a) above might have to be modified in the light of the exact provisions of the agreement.”

The reference to “item (a)” is to the allowance in respect of rent which I have mentioned above. In such a case as the present the damages might perhaps be measured by an amount to cover sums unpaid under the agreement up to seizure, and compensation for breach of the agreement to maintain the vehicle in good order, condition and repair, which might include both the cost of making good the failure in that respect and an amount representing the value of undue depreciation arising from that failure. I am not in the least attempting to make an exhaustive list of the heads of damage as the matter was not argued before this court in this way, but I think that what I have said sufficiently indicates that the claim of the appellants, even if it is conceded to be a claim for damages, was brought on a wrong basis. On the pleadings and the evidence, and having regard to the way in which the case was conducted before him, and in the absence of any application to amend, the learned judge was in my opinion (and subject to an aspect of the matter dealt with later in this judgment) quite correct in refusing to entertain the claim. He could not give judgment for the appellant on the basis of the claim as pleaded and he had no material which would have entitled him to give judgment for damages on any other basis.

In the course of his judgment the learned judge said:

“Clause 6 (c) would undoubtedly be a penalty clause: (see *Landom Trust v. Hurrell*, [1955] 1 All E.R. 839.)”

It is not quite clear from the context whether the learned judge was at this stage merely recounting an argument advanced by counsel for the respondent,

but the appellant has regarded it as an expression of the judge's opinion and made it the subject of a ground of appeal. If it is an opinion, it is one which is quite immaterial to the learned judge's decision and clearly obiter. Counsel for the appellant before this court disclaimed any intention of basing his suit on the clause in question, and certainly no reference to it appears in the plaint. Counsel nevertheless asked this court to express an opinion on the question as it was a matter of importance to the appellant. To accede to that request would not be within the bounds of normal practice and would in my opinion be of advantage to no one. That the question of the proper construction of such clauses can be difficult is clear from a perusal of the judgments of the judges of the Court of Appeal in *Cooden Engineering Co. Ltd. v. Stanford* (3), and from the fact that the authority quoted by the learned trial judge, *Landon Trust Ltd. v. Hurrell* (7), [1955] 1 All E.R. 839 was not followed in *United Dominions Trust (Commercial) v. Scott-Bowen* (8) (1957), 73 Sh. Ct. Rep. 293—see para. 836 of the Fourth Cumulative Supplement to Chitty on Contracts (General Principles) (21st Edn.).

In the concluding passage of his judgment the learned trial judge considered whether he could give some relief to the appellant, but found that he could not without changing the cause of action. In the course of the evidence the respondent had admitted that there were four hire instalments owing at the time the vehicle was seized, and counsel for the respondent, when asked during the hearing before this court, could not say that he would be prejudiced or embarrassed if effect were given to this admission—he relied on the way the pleadings were framed. Counsel for the appellant at the last minute asked, if the court were against him in his main argument, to amend his pleadings to claim these four instalments and a proportionate part of an instalment due from January 8, 1958, to the date of seizure, January 19, 1958. I think that the application should be acceded to in the interests of justice and that in view of the present wording of paras. 1 and 2 of the plaint it will not be necessary to formulate a specific amendment. I would therefore allow the appeal on that basis, which will entail setting aside the decree in the court below and ordering that judgment be entered for the appellant for the sum of Shs. 3,196/45 (representing four instalments of Shs. 734/- and a proportionate part of an instalment from January 8–19, 1958). As to costs, I have been in doubt whether, in view of the course of the litigation, the appellant should not pay for the whole of it. On full consideration, I think that the interests of justice would best be served by ordering that the order in the court below that the appellant pay the respondent's costs, be maintained, and that the appellant also pay one half of the respondent's costs of the appeal.

Sir Alastair Forbes V-P: I agree and have nothing to add. There will be an order in the terms proposed by the learned Justice of Appeal.

Connell J: I also agree.

Appeal allowed in part. Appellant to pay the respondent's cost in the court below and half the respondent's costs of the appeal

For the appellant:

AE Hunter

For the respondent:

RB Bhandari

For the appellant:

Advocates: *Daly & Figgis*, Nairobi

For the respondent:
Bhandari & Bhandari

Sheikh Mohamed Bashir v the Commissioner of Income Tax
[1961] 1 EA 240 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 23 May 1961
Case Number: 19/1961
Before: Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA

[1] Jurisdiction – Court of Appeal – Bankruptcy – Receiving order – Application for stay pending appeal to Privy Council – No application filed for conditional leave to appeal to Privy Council – Whether application competent – Bankruptcy Ordinance (Cap. 30), s. 107 (K.) – Eastern African (Appeal to Privy Council) Order in Council, 1951, s. 4, s. 6 and s. 7 – Eastern African Court of Appeal Rules, 1954, r. 53 – Eastern African Court of Appeal Order in Council, 1950, s. 16.

Editor's Summary

A receiving order having been made against the applicant by the Supreme Court of Kenya the applicant appealed against that order and also applied to the Supreme Court under s. 107 of the Bankruptcy Ordinance for a stay under the receiving order pending appeal to the Court of Appeal. The application to the Supreme Court for a stay and his appeal against the receiving order were dismissed whereupon the applicant applied to the Court of Appeal for a stay pending appeal to the Privy Council. No application for conditional leave to appeal to the Privy Council under s. 4 of Eastern African (Appeal to Privy Council) Order in Council, 1951 had been filed by the applicant when this application was heard and the respondent contended that unless and until leave was being granted the court had no power to suspend execution under s. 7 of the Eastern African (Appeal to Privy Council) Order in Council and that the application was incompetent.

Held –

- (i) under s. 4 of Eastern African (Appeal to Privy Council) Order in Council, 1951, an appeal to the Privy Council is initiated by an application to the Court of Appeal for conditional leave to appeal; therefore an appeal to the Privy Council could not be pending until such leave has been granted or perhaps, at the earliest, until an application for leave has been filed.
- (ii) rule 53 of the Eastern African Court of Appeal Rules, 1954, only applies when an appeal to the Court of Appeal is pending; as the appeal had already been determined there was no appeal pending before the Court of Appeal and, accordingly, the Court of Appeal was not in a position to exercise the powers vested in the Supreme Court by virtue of s. 107 of the Bankruptcy Ordinance.
- (iii) the jurisdiction of the Supreme Court under s. 107 of the Bankruptcy Ordinance is not limited by the existence of s. 7 of Eastern African (Appeal to Privy Council) Order in Council, 1951, and an

application for stay could be considered by the Supreme Court under that section more effectively than by the Court of Appeal.

- (iv) the Court of Appeal had no jurisdiction to hear the application and accordingly the application was incompetent.

Application dismissed.

Case referred to:

- (1) *G. R. Mandavia v. Commissioner of Income Tax*, [1957] E.A. 1 (C.A.).

Judgment

Sir Alastair Forbes V-P read the following ruling of the court: This was an application for an order:

“That all proceedings consequential to and upon the making of the receiving order against the applicant by Her Majesty’s Supreme Court of Kenya at Nairobi in its Bankruptcy Cause No. 76 of 1960 be stayed pending the hearing and determination of the applicant’s intended appeal to Her Majesty in Council against the judgment of this honourable court delivered on May 9, 1961, in its Civil Appeal No. 7 of 1961.”

The applicant had a receiving order made against him by the Supreme Court of Kenya on November 21, 1960. He appealed to this court against that order and made application to the Supreme Court under s. 107 of the Bankruptcy Ordinance (Cap. 30) for a stay of proceedings under the receiving order pending appeal to this court. This application was refused by the Supreme Court and the applicant then applied to this court for a stay of proceedings. This court was able to fix a very early date for the hearing of the appeal, and with this in view granted a stay as to any application for adjudication in bankruptcy which might arise from a meeting of creditors which was due to be held two days after the application was heard. In the event, the applicant’s appeal to this court against the receiving order was dismissed on May 9, 1961. On May 19 the applicant served notice on, inter alia, the registrar of this court of intention to appeal to Her Majesty in Council against the decision of this court and on the same date filed this application for stay of proceedings pending appeal. No application for conditional leave to appeal to Her Majesty in Council under s. 4 of the Eastern African (Appeal to Privy Council) Order in Council, 1951 (hereinafter referred to as “the Privy Council Order in Council”) has been filed by the applicant.

At the hearing of the application preliminary objection was taken that the application was incompetent. After hearing argument on the preliminary objection we held that we had no jurisdiction to entertain the application which we accordingly refused with costs. We now give our reasons for this decision.

Counsel for the respondent based his objection to the jurisdiction of this court on the provisions of s. 7 of the Privy Council Order in Council, which relates to the suspension of execution of a judgment of this court pending appeal to Her Majesty in Council. The relevant portion of s. 7 reads as follows:

“7. Where the judgment appealed from requires the appellant to pay money or do any act, the court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal . . .”

Counsel for the respondent stressed the words “when granting leave to appeal”, and argued that unless and until leave was being granted the court had no power to suspend execution. He further stressed the words:

“Where the judgment . . . requires the appellant to pay money or do any act”,

and argued that the judgment in the instant case did not require the appellant to pay money or do any act; that the appeal was against the making of a receiving order which merely had the effect of constituting the Official Receiver the receiver of the property of the applicant; and that the subsequent procedure

after the making of the receiving order was governed, not by the judgment of the court, but by the provisions of the Bankruptcy Ordinance. He further submitted that the correct course for the applicant was to make application to the Supreme Court under s. 107 of the Bankruptcy Ordinance, which reads as follows:

“107. The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to such conditions as the court may think just.”

Counsel for the applicant stated that he was not asking the court to exercise jurisdiction under s. 7 of the Privy Council Order in Council. He argued at first that this court was seised of the powers conferred by s. 107 of the Bankruptcy Ordinance. He referred to r. 53 of the Eastern African Court of Appeal Rules, 1954 (hereinafter referred to as “the appeal Rules”) and argued that though the powers under s. 107 of the Bankruptcy Ordinance were vested in the Supreme Court in the first instance, nevertheless this court had concurrent jurisdiction with the Supreme Court and could exercise the powers of the court under that section. He subsequently argued that this court would, in any case, have power to make the order applied for under s. 6 (b) of the Privy Council Order in Council.

As regards s. 107 of the Bankruptcy Ordinance, we have no doubt that we have no jurisdiction at this stage to order a stay of proceedings under that section. Jurisdiction under that section is vested in “the court”, and the court is defined in the Bankruptcy Ordinance as the court having jurisdiction in bankruptcy, that is to say, in the instant case, the Supreme Court. Section 16 of the Eastern African Court of Appeal Order in Council, 1950, which confers jurisdiction to hear appeals on this court, provides, *inter alia*, that

“for all purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, the court shall have the power, authority and jurisdiction vested in the court from which the appeal is brought.”

It is clear that the powers possessed by the Supreme Court are only vested in this court in relation to the hearing and determination of an appeal to this court. Rule 53 of the Appeal Rules also applies only where an appeal to this court is pending. There is here no appeal to this court pending since the appeal to this court has already been determined. The court is therefore not in a position to exercise the powers vested in the Supreme Court by virtue of s. 107 of the Bankruptcy Ordinance. In any case, even if this court had jurisdiction, any such application should be made in the first instance to the Supreme Court. No such application has been made to the Supreme Court, since the present application, which is for a stay pending the appeal to the Privy Council, is entirely distinct from the original application refused by the Supreme Court, which was for a stay pending appeal to this court.

Section 6 of the Privy Council Order in Council reads as follows:

- “6. A single judge of the court shall have power and jurisdiction:
- (a) to hear and determine any application to the court for leave to appeal under para. (a) of s. 3 of this Order; and
 - (b) generally, in respect of any appeal pending before His Majesty in Council, to make such other order and to give such other directions as he shall consider the interests of justice or the circumstances of the case require:

“Provided that any order, directions or decision made or given in pursuance of the power conferred by this section may be varied, discharged or reversed by the court.”

Counsel for the applicant argued that para. (b) of this section conferred wide power, not only on a single judge, but on the court, to give any directions he or it thought fit in the interests of justice and that such power would include power to order a stay of proceedings pending appeal; and he further contended that since notice of an intention to appeal had been served on the registrar, an appeal was “pending”.

We were unable to accept these arguments. In the first place, an appeal to the Privy Council is initiated by application to this court under s. 4 of the Privy Council Order in Council for conditional leave to appeal. An appeal to the Privy Council, in our view, is not pending until such leave has been granted or perhaps, at the earliest, when an application for leave has been filed. In the instant case there was not even an application for such leave. In the second place we do not think that para. (b) of s. 6 of the Privy Council Order in Council can be read as conferring unlimited powers to order a stay of proceedings in view of the express provisions of s. 7. If s. 6 were to be construed as giving power to order a stay, the provisions of s. 7 would be redundant. In *Mandavia v. Commissioner of Income Tax* (1), [1957] E.A. (C.A.) 1, at p. 3, this court said:

“We found ourselves unable to accept the view that we have any wider jurisdiction to order a stay than is conferred upon us by s. 7 of the Order in Council. There is nothing in Part VIII or r. 53 of the 1954 Rules of this Court which extends, or purports to extend that jurisdiction.”

It is true that in that case the effect of s. 6 of the Order in Council was not expressly discussed, but the court considered whether it had inherent jurisdiction to order a stay in an appeal to the Privy Council apart from s. 7, and reached the conclusion stated above. We respectfully agree with the conclusion of the court in that case, and in any event think we are bound by that decision. We have no doubt that the powers of this court with regard to stay in an appeal to the Privy Council are governed and limited by s. 7 of the Privy Council Order in Council.

It followed from these conclusions that the application to this court was incompetent, and we refused it accordingly. We do not need, for the purposes of this decision, to consider the second argument advanced by counsel for the respondent, namely, whether the judgment appealed from in the instant case requires the appellant to “pay money or do any act”. We would say, however, that we should require to be convinced that the judgment in the instant case does fall within s. 7 of the Privy Council Order in Council if we should be called on to consider an application for stay under that section. In our view, the jurisdiction of the Supreme Court under s. 107 of the Bankruptcy Ordinance is not limited by the existence of s. 7 of the Privy Council Order in Council, and we think that an application for stay can be considered by the Supreme Court under that section more effectively than we are able to do at this stage. Justice requires, *inter alia*, that the interests of creditors should be duly taken into account when considering a stay, and this the Supreme Court is able to do on an application under s. 107; whereas this court is not in a position to consider adequately the creditors’ point of view on an application made in the first instance in this court.

Application dismissed.

For the applicant:

K Bechgaard QC and SC Gautama

For the respondent:

JC Summerfield (Deputy Legal Secretary, E.A. High Commission)

For the Official Receiver:

DD Charters (Deputy Official Receiver, Kenya)

For the applicant:

Advocates: *Satish Gautama*, Nairobi

For the respondent:

The Legal Secretary, E.A. High Commission

Gamalieri Mubito v R
[1961] 1 EA 244 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 9 June 1961
Case Number: 34/1961
Before: Sir Kenneth O'Connor P, Gould Ag V-P and Newbold JA
Appeal from: H.M. High Court of Uganda–Sheridan, J

[1] *Criminal law – Practice – Irregularity – Prosecutor both investigating officer and witness at trial – Whether accused prejudiced – Game (Preservation and Control) Ordinance, 1959, s. 5 (1) (b) and s. 22 (1) (U.) – Criminal Procedure Code, s. 84 and s. 347 (U.) – Indian Code of Criminal Procedure, s. 495 and s. 537 – Evidence Ordinance (Cap. 9), (U.).*

[2] *Criminal law – Evidence – Burden of proof – Burden of proof placed on accused by law – Game (Preservation and Control) Ordinance, 1959, s. 23 (U.).*

Editor's Summary

The appellant had been convicted of unlawful possession of elephant tusks contrary to s. 22 (1) of the Game (Preservation and Control) Ordinance, 1959, and his appeal to the High Court was dismissed. A game ranger who had police powers and had investigated the case acted as prosecutor in the magistrate's court and also gave evidence. On a second appeal it was argued that the appellant had been prejudiced by the investigating officer acting as prosecutor and giving evidence, and that the appellant had discharged the onus placed on him by s. 23 of the Ordinance, having given an explanation of the possession of the tusks which might reasonably be true.

Held –

- (i) in Uganda there is no express provision of law which forbids a police officer from prosecuting a case which he has investigated and a trial is not ipso facto invalidated if the investigating officer gives evidence.

- (ii) that the game ranger had taken part in the investigation and was also prosecuting went to the weight of his evidence, not to his competency to give it.
- (iii) in a criminal case a person who is known to be a witness should usually be ordered out of court, but if he gives evidence, that evidence is competent, though objection could be made to the weight of it.
- (iv) there is no provision in the Evidence Ordinance which disqualifies a person from giving evidence merely because he is in court when other witnesses are testifying.
- (v) although what occurred were grave irregularities, in the circumstances of the case and having regard to the evidence given by the game ranger, no failure of justice had occurred.
- (vi) the magistrate found that the appellant's story could not be true and there was evidence to support such finding; accordingly the appellant did not discharge the onus cast upon him by s. 23 of the Game (Preservation and Control) Ordinance, 1959.

Appeal dismissed.

Cases referred to:

- (1) *Duncan v. Toms*, 16 Cox C.C. 267.
- (2) *Emperor v. Tribhovandas Brijbhukandas* (1902), 26 Bom. 533.
- (3) *Biradmal v. Prahbati*, [1939] Kar. 258; 43 C.W.N. 842.
- (4) *R. v. Wylde* (1834), 6 C. & P. 380.
- (5) *Cook v. Nethercote* (1835), 6 C. & P. 741.
- (6) *Chandler v. Horne* (1842), 2 Mood & R. 423; 174 E.R. 338.
- (7) *Cobbett v. Hudson* (1852), 1 E. & B. 11; 118 E.R. 341.

Judgment

The following judgment prepared by **Sir Kenneth O'Connor P:** was read by **Gould Ag V-P:**

This is a second appeal from a judgment of the district court at Masindi, Uganda. The appellant was convicted on August 31, 1960, of unlawful possession of elephant tusks contrary to s. 22 (1) of the Game (Preservation and Control) Ordinance, 1959, (hereinafter called "the Ordinance"). He was acquitted of a charge of unlawful killing of an immature elephant under s. 5 (1) (b) of the Ordinance, his explanation that he killed it in self-defence being accepted. The appellant appealed against his conviction to the High Court and his appeal was dismissed on February 13, 1961. He now appeals to this court.

Section 22 (1) of the Ordinance, so far as material, reads:

"Notwithstanding any other provision of this Ordinance relating to trophies, any person who possesses . . . any ivory . . . otherwise than in accordance with the provisions of this Ordinance shall be guilty of an offence . . ."

Section 23 reads as follows:

"Whenever any person is charged with being in possession of or selling, buying, transferring or exporting any animal or trophy obtained in contravention of this Ordinance and proof is given that the possession was acquired or the act of selling, buying, transferring or exporting was done the onus shall be upon the person charged to prove that the animal or trophy was lawfully obtained."

By definition the word "trophy" in this section includes any tusk of a scheduled animal; the elephant is a scheduled animal. "Ivory", in s. 22 (1) means elephant ivory.

The circumstances of the case and of the trial in the district court are set out in the judgment of the learned resident magistrate as follows:

"On May 21, 1960, the accused went to the game guard at Rakanyi and reported that he had shot two elephants—accused had a licence to kill only one elephant.

"The game guard told him to produce the tusks; he produced, on the following morning two sets of tusks, a small set, fresh and with pieces of meat on it, suggesting they had recently been pulled out of an elephant, and a larger set which was dried and appeared to have been pulled out of an elephant a long time ago—years ago.

"The game guard visited the scene with the accused. He was able to identify the carcasses of two small elephants, and the head of one. Only one head was at the scene; also the ribs of a baby elephant. The tusks, head and ribs have been produced in court.

"The head produced had sockets into which a small set of tusks fitted easily; this was demonstrated to the court by the game ranger.

"The carcass of the smaller elephant was present but not its head. From the carcass, particularly the ribs, it appeared to the game guard and game ranger that it was an immature elephant.

"The game ranger went on to give technical evidence showing that the large tusks had been taken from an elephant that had long been dead in the bush. He states that tusks taken from a freshly killed elephant would be damp at the socket end and have pieces of meat on it, and chop marks,

while an old set of tusks would be brittle at the socket end, have no pieces of meat, and the colour at the socket end would be the same colour as on rest of the tusk in comparison to freshly pulled tusks which would be whiter at the socket end.”

The game ranger (Mr. Robson) went on to give further technical evidence.

The learned resident magistrate said that he was convinced by the proofs and tests shown to the court by the game ranger that the large set of tusks could not have been taken out of an elephant shot on the day the appellant alleged. Accordingly he convicted the appellant of unlawful possession of those tusks.

Mr. Mukasa, who appeared for the appellant, argued the appeal on two grounds. The first was that the game ranger, who had police powers and who had taken part in the investigation of the case, had conducted the prosecution case and, at the close of it, had himself given evidence; and that the appellant had suffered prejudice by this procedure. The second ground was that the learned judge had erred in law in holding that the appellant had not discharged the onus of proof placed upon him by s. 23 of the Ordinance.

As to the first ground: learned Crown Counsel pointed out that in England a private prosecutor may conduct his case and give evidence himself, and it had been held, under the special provisions of a statute, that an inspector of the Society for the Prevention of Cruelty to Animals who had preferred a complaint might appear and conduct the prosecution which was not a private prosecution, but a prosecution at the suit of the Crown: *Duncan v. Toms* (1), 16 Cox C.C. 267. We do not think, however, that that authority is in point in Uganda.

In Uganda, under s. 84 of the Criminal Procedure Code, a magistrate may permit a prosecution to be conducted by any person.

In Uganda there is no express provision of law which forbids a police officer from prosecuting a case which he has investigated. There is such a provision in India—s. 495 (4) of the Indian Code of Criminal Procedure. In India, it has been held that to contravene that sub-section is a grave irregularity, but it is curable under s. 537 of the Indian Code and does not invalidate the trial unless the accused were prejudiced: *Emperor v. Brijbhukandas* (2) (1902), 26 Bom. 533. A fortiori in Uganda a trial is not ipso facto invalidated if the investigating officer gives evidence; but, in our view the practice is irregular and undesirable and may avoid the trial if prejudice to the accused has resulted.

There is some analogy between the position of the person conducting a prosecution and that of counsel in a case. It has been held that if a person is in a position to give important evidence, his evidence should not be refused because he is counsel in the case, though the fact that he is a witness may be a good reason for returning the brief: *Biradhmāl v. Prahbati* (3), 43 C.W.N. 842. The report of that case is not available here; but the case is cited in Sarkar on Evidence (10th Edn.), at p. 1048. We think that, in the present case, the facts that the game ranger had taken part in the investigation and was prosecuting, went to the weight of his evidence, not to his competency to give it.

Mr. Mukasa next argued that a prosecution witness who had been present in court and had heard the other prosecution witnesses testifying should not have been permitted to give evidence. It appears that in England such a witness may not be allowed to give evidence: *R. v. Wylde* (4) (1834), 6 C. & P. 380. On the other hand, it has been held that his mere presence in court is not a ground for rejecting his evidence, but is merely a matter for observation on his evidence: *Cook v. Nethercote* (5) (1835), 6 C. & P. 741; *Chandler v. Horne* (6) (1842), 2 Mood & R. 423; and see *Cobbett v. Hudson* (7) (1852), 1 E. & B. 11. It does not appear that there is any difference in principle in this respect

between a witness in a civil case and a witness in a criminal case. Though in a criminal case a person who is known to be a witness will usually be ordered out of court, it appears that if he does give evidence, that evidence is competent, though objection could be made to the weight of it.

We cannot find any provision in the Evidence Ordinance of Uganda which disqualifies a person from giving evidence merely because he has been present in court when other witnesses were testifying. That circumstance may, of course, materially affect the weight of his testimony.

The question really is whether the irregularity or irregularities has or have occasioned a failure of justice: Criminal Procedure Code, s. 347. The circumstances of each case must be individually examined. If, in a given case, the evidence of the investigating officer was merely formal, then clearly no failure of justice will have been occasioned by his giving it or by his having been in court while other witnesses were testifying. On the other hand, in a case where an investigating officer conducted the prosecution himself or was present while the prosecution witnesses gave their evidence and then entered the witness box and supplemented their testimony by his own evidence on material points of fact, the court might well be of opinion that a failure of justice had, in fact, been occasioned.

In the present case, the game ranger's evidence was in the nature of expert evidence tending to show that the tusks in question were old and large and could not have come from the freshly killed and immature elephant from which the appellant said that he had obtained them. The game ranger was cross-examined on other points, but his opinion as to the age and size of the tusks does not seem to have been challenged in cross-examination. This opinion evidence was receivable, provided that the magistrate considered, as apparently he did, the game ranger qualified to give it. His qualifications as an expert should have been recorded.

We think that what occurred were grave irregularities which, however, should not, having regard to s. 347 of the Criminal Procedure Code, affect the conviction, unless a failure of justice was, in fact, occasioned. In the circumstances of this case and having regard to the nature of the evidence given by the game ranger, we think that no failure of justice was in fact occasioned, and that this ground of appeal fails.

As to the second ground of appeal, Mr. Mukasa argued that the onus cast on the appellant by s. 23 of the Ordinance was discharged if he gave an explanation of his possession of the tusks which might reasonably be true and that he had done this: the onus then shifted to the prosecution to prove their case beyond reasonable doubt.

Assuming that an accused person need, under s. 23, only put forward an explanation which might reasonably be true, it appears to us that the learned magistrate made a finding that the accused had not done this in this case. The magistrate said that the proofs and tests shown to the court by the game ranger had convinced him that the large set of tusks could not have been taken out of an elephant shot on the day the accused alleged. This is a finding that the appellant's story could not be true and there was evidence to support such a finding. Accordingly we think that the appellant did not discharge the onus cast upon him by s. 23 of the Ordinance.

The learned judge in the High Court was of opinion that there were no good grounds for setting aside the conviction, an opinion which, for the above stated reasons, we share. The appeal is dismissed.

Appeal dismissed.

For the appellant:

AWK Mukasa

For the respondent:

KT Fuad (Crown Counsel, Uganda)

For the appellant:

Advocates: *Kiwanuka & Co*, Kampala

For the respondent:

The Attorney-General, Uganda

Kenya Aluminium and Industrial Works Ltd v the Minister for Agriculture [1961] 1 EA 248 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	7 June 1961
Case Number:	98/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA
Appeal from:	H.M. Supreme Court of Kenya–Edmonds, J

[1] Agriculture – Wheat industry – Licensing of mills – Application to install more machinery – Applicant a licensed miller – Application refused by Minister – Decision on grounds of official policy – Facts of application not considered – Duty to consider facts – Wheat Industry Ordinance, 1952, s. 9, s. 12 (K.) – Wheat Industry (Amendment) Ordinance, 1959, s. 3 (K.).

[2] Appeal – Appeal from decision of Minister – Decision on grounds of official policy – Principles which should guide the court on appeals from administrative body – Whether court must consider any policy influencing decision appealed from.

Editor's Summary

The appellant company, a miller licensed under the Wheat Industry Ordinance, 1952, applied to the Minister for Agriculture under s. 9 for a licence to install additional machinery to increase the milling capacity of its mill. The Minister rejected the application on the ground that to grant the licence would be contrary to the established policy of the government which was to give protection to the local milling industry and contrary also to the Interterritorial Wheat Agreement made in 1959 by the governments of Kenya and Tanganyika. On appeal to the Supreme Court pursuant to s. 12 of the Ordinance evidence was given of the facts on which the application was based and it was submitted that the Minister should have but had not considered the merits of the application. The appellate judge upheld the decision of the Minister holding *inter alia* that the court was entitled to take into consideration any policy which might have influenced the administrative body in reaching its decision. The appellant company further appealed

and submitted that though the appellate judge had correctly directed himself as to the principles applicable, he had failed to apply those principles correctly because the Minister had not considered any fact except policy and it was, accordingly, the duty of the court to treat the appeal as a re-hearing on all the facts and if the appellate judge then thought the application ought to be granted, it followed that the Minister was wrong.

Held –

- (i) the appellate judge of the Supreme Court had correctly held that
 - (a) where a right of appeal is unrestricted in its terms it is open to the court to hear all the evidence and substitute its decision thereon for that of the administrative body;
 - (b) in reaching its decision the court must take into consideration any policy which may have influenced the administrative body in reaching its decision and consider if the decision of that body was arrived at after consideration whether the facts called for the application of the policy and must be satisfied that application of the policy is proper on the facts;
 - (c) in arriving at its decision the court must be guided by the consideration not whether the administrative body was right in coming to the conclusion it did but whether that conclusion was wrong.

- (ii) the importance of policy may vary to an infinite degree; a particular policy may be of trivial importance and easily displaced by other considerations but it is not possible to lay down any standard for the displacement of a policy and each case must be considered on its merits.
- (iii) the learned judge was clearly impressed by the importance of the policy and it could not be said that he was wrong.

Appeal dismissed.

Cases referred to:

- (1) *Stepney Borough Council v. Joffe and Others*, [1949] 1 All E.R. 256.
- (2) *R. v. Port of London Authority Ex parte Kynoch Ltd.*, [1919] 1 K.B. 176.
- (3) *R. v. Torquay Licensing Justices*, [1951] 2 All E.R. 656.

June 7. The following judgments were read by directions of the court:

Judgment

Sir Alastair Forbes V-P: This is an appeal from a judgment and decree dated September 12, 1960, of the Supreme Court of Kenya sitting at Mombasa, whereby an appeal to the Supreme Court under s. 12 of the Wheat Industry Ordinance, 1952, (hereinafter referred to as “the Ordinance”) against a refusal by the Minister of Agriculture, Animal Husbandry and Water Resources (hereinafter referred to as “the Minister”) to grant permission to the appellant company under s. 9 of the Ordinance to make additions to its machinery was dismissed with costs.

Section 9 and s. 12 of the Ordinance, which are the relevant provisions for the purposes of this appeal, read as follows:

- “9.(1) No person shall, except with prior permission in writing from the member, make any addition to or replacement or substitution of any machinery in any mill in respect of which a mill licence is in force, which will have the effect of increasing the capacity for the production of flour at such mill.
- “(2) Any application under sub-s. (1) of this section for permission to make any addition to or replacement or substitution of any machinery as is mentioned in that sub-section shall be made in the prescribed form to the member who, after obtaining the advice of the Wheat Board, shall in his discretion either grant or refuse permission.”
- “12. Any person aggrieved by the refusal of the member to grant a licence under s. 6 or s. 13 of this Ordinance or to grant any permission required under s. 7, s. 9 or s. 10 of this Ordinance may within thirty days of the date of such refusal appeal to the Supreme Court.”

Section 12 of the Ordinance was repealed by s. 3 of the Wheat Industry (Amendment) Ordinance, 1959, with effect from November 17, 1959, but such repeal was expressed to be without prejudice to the rights of any person who had appealed to the Supreme Court under the section and whose appeal was pending on the date the repeal came into operation. The appeal to the Supreme Court in this case was filed in September, 1959.

The basis for the refusal of the appellant company’s application for permission to install additional machinery was the established policy of the Government as originally stated in the objects and reasons to

the Bill for the Ordinance. This policy was directed to providing protection for the wheat growing and wheat milling industries in Kenya, it being explained in evidence that without such protection flour of equivalent quality to the local product could be imported into East Africa more cheaply than it could be produced there. The policy

involved, *inter alia*, the avoidance of redundancy in mills. The learned judge described it as a policy:

“arrived at in the interests of the public and in a sense of paternalism towards the industry”.

In pursuance of this policy the Kenya Government in June, 1959, concluded an agreement with the Tanganyika Government which, in effect, secured the adherence of the Tanganyika Government to the policy, to the obvious benefit of wheat growers and millers in Kenya. The important provisions of this agreement (hereinafter referred to as “the interterritorial agreement”) in relation to this case are articles II and X which read as follows:

“Article II—Licensing of Mills.

“(1) The parties hereto shall not within their respective territories permit the milling of wheat except in a licensed mill:

“Provided that nothing in this clause shall apply to grist.

“(2) The parties hereto shall not within their respective territories, grant any licences for the establishment or operation of any flour mills other than the mills specified in the First and Second Schedules hereto, or licence or permit any increase in the capacity of the mills specified in the said Schedules beyond the capacity specified in the said Schedules in respect of each such mill until:

(i) the consumption of flour throughout the East African Territories has reached 85 per cent. of the total milling capacity specified in the First Schedule hereto; and

(ii) the agreement of the other parties to the issue of such licence or permit has been obtained;

“Provided that nothing in this clause shall prevent or restrict the parties hereto from granting licences for the establishment or operation of flour mills at which owners of wheat may have their wheat milled and the flour thus produced returned to them for their own domestic consumption.”

“Article X—Powers.

“The parties hereto shall introduce such legislation as may be necessary to give full effect to their obligations under this agreement and shall exercise their powers under their respective legislation to give full effect, so far as in them lies, to this agreement.”

On the appellant company’s side the factors relied on before the Supreme Court were summarised by the learned judge as follows:

“(1) There is a large unsatisfied consumer demand for the products of the appellant company.

“(2) The company produces certain special products which are in particular demand in the coastal province.

“(3) The company’s mill is an up-to-date and efficient one and the only modern mill in the coastal province.

“(4) The company has an efficient distribution system which ensures the delivery of fresh supplies to consumers.

“(5) Owing to circumstances beyond the appellant’s control earlier applications for increases of capacity were not granted.

- “(6) The proposed increase in capacity is justifiable on economic grounds as with the increased machinery flour could be more economically produced. By doubling their plant and hence their capacity, there would be a decrease in the cost of production, a portion of which would probably be passed on to the consumer.
- “(7) Since January, 1958, except for three months, the appellant’s sales have exceeded their quota of flour.
- “(8) There is a trend towards an increase of the Asian and Arab population.
- “(9) There was no real excess capacity in Kenya up to 1956. The excess thereafter developed because of the action by Unga Limited, who are the millers with the largest capacity, in operating in Tanganyika and Uganda.”

In explanation of the last item, it may be said that Unga Ltd. is by far the largest wheat milling concern in Kenya; that in 1956 they established mills in Tanganyika; and that at the material time their Kenya mills were not producing to capacity.

The learned judge of the Supreme Court, in a full and careful judgment, discussed the effect of the authorities as to the principles which should guide him on an appeal from a decision of an administrative body in the exercise of a discretion reposed in it by the legislature, and concluded that these principles were as follows:

- “(1) where a right of appeal is entirely unrestricted in its terms, it is open to the court to hear all the evidence that is adduced and substitute its decision thereon for that of the administrative body;
- (2) in arriving at its decision the court must take into consideration any policy which may have influenced the administrative body in reaching its decision and:
 - (a) consider if the decision of that body was arrived at after a consideration whether the facts of the case called for the application of the policy, and
 - (b) in any event, must be satisfied that the application of that policy is proper on the facts;
- (3) in arriving at its decision the court must be guided by the consideration not whether the administrative body was right in coming to the conclusion that it did, but whether that conclusion was wrong.”

I would respectfully agree (though they are not exhaustive) with these conclusions of the learned judge for the reasons which he gives, and Mr. Salter, Q.C., who appeared before this court for the appellant company, conceded that he could not quarrel with them. Mr. Salter submitted, however, that the learned judge, though he had correctly directed himself as to the principles, in fact had failed to apply those principles correctly.

The grounds of appeal in the appeal to this court are as follows:

- “1. That the learned judge misdirected himself in law:
 - (i) in holding that, before the appellant could succeed, it was necessary for the court to be satisfied that the decision of the respondent, in refusing the appellant’s application, was wrong;
 - (ii) in failing to reach a conclusion upon the facts and merits of the appellant’s application irrespective of the respondent’s said decision;

- (iii) in holding that it was necessary for the appellant to show exceptional grounds before the said application could properly be granted; and
 - (iv) in holding that to allow the appellant's appeal would be to infringe the policy of the Kenya Government.
- "2. That the decision of the learned judge was contrary to the merits of the appellant's said application, which should have been granted."

Mr. Salter conceded that it was necessary for the appellant company to show generally that the decision of the Minister was wrong, but argued that there was no "onus" on the appellant company to "satisfy" the court that he was wrong; that it was here shown that no facts except policy were considered by the Minister; that it was therefore the duty of the court to approach the case with an entirely open mind and treat the appeal as a re-hearing on all the facts presented; that the learned judge ought to have considered all the facts of the case and if he thought the application ought to be granted it followed the Minister was wrong.

I have endeavoured to set out Mr. Salter's argument as I understood it, but I am not sure that I appreciate the distinction he was seeking to draw. It may be noted that the argument appears to be at variance with the position taken by Mr. Wilbeforce, Q.C., who appeared for the appellant company on the appeal to the Supreme Court. Mr. Wilbeforce is recorded as saying:

"Accept that court should not lightly set aside Minister's decisions and onus on applicant."

This concession and the learned judge's view is based on the dicta of Lord Goddard, C.J. (cited by the learned judge) in the following passage from his judgment in *Stepney Borough Council v. Joffe and Others* (1), [1949] 1 All E.R. 256 at p. 258:

"On the other hand, there is given here an unrestricted right of appeal, and, if there is an unrestricted right of appeal, it is for the court of appeal, in this case the metropolitan magistrate, to substitute its opinion for the opinion of the borough council. That does not mean to say that the court of appeal ought not to pay great attention to the fact that the duly constituted and elected local authority have come to an opinion on the matter and ought not lightly to reverse their opinion. It is constantly said (although I am not sure that it is always sufficiently remembered) that the function of a court of appeal is to exercise its powers where it is satisfied that the judgment below is wrong, not merely because it is not satisfied that the judgment was right."

Mr. Salter argued that this passage did not mean that the court must be satisfied that the decision appealed from was wrong; that once all the facts were before the court then the duty of the court was to look at them and say if the decision was wrong; but that it was for the appellant to show such factors as will persuade the court the decision of the Minister was wrong.

As I have already said, I do not follow the distinction in law which Mr. Salter contended existed. It appears to me that in law, as stated by Lord Goddard, there is an onus on an appellant to satisfy the appellate court that the decision appealed from was wrong. It seems to me that the real complaint in the instant case is on fact and not on law—that the point at issue is a question of degree. Actually, in a case such as the present one where a number of factors, for and against, including factors which were not before the Minister, have to be balanced, the question of onus will normally have little importance. It will be possible for the court on the facts without considering the question of onus to say either that it agrees or disagrees with the Minister's decision. It will only be in a case where the court is in doubt on the facts that then the question

of the onus on the appellant must be taken into account. In the instant case one factor alone is relied on by the Minister—the public interest as embodied in the policy of Government. Against that the appellant company has put into the scales a number of factors which relate to the individual interest of the appellant company.

Mr. Salter conceded that the court, in reaching its own decision in the matter, ought to have regard to any “legitimate” policy of the Government; but he sought to draw a distinction between policy as such and policy as laid down in the Ordinance. Once again I find difficulty in following the distinction which Mr. Salter seeks to make. The policy of a particular legislative measure may have to be considered by the courts when the construction of some part of the measure is under consideration; and for this purpose the policy as apparent from the measure itself is all that the courts can have regard to. But that is a very different matter from the consideration of policy and reasons for policy as relevant facts to be weighed in a case such as the present one. Reference was made in evidence to the objects and reasons to the Bill for the Ordinance as being a statement of the policy of Government. Mr. Salter suggested that this reference to the objects and reasons was wrong. I cannot, however, see any objection to reference to the objects and reasons as a statement of the policy pursued by Government any more than there would be objection to reference to, say, a White Paper, setting out Government policy. No question of the construction of the Ordinance is involved, but merely what is the policy which the Minister is taking into account and the reasons for such policy.

That matters of policy may properly be taken into account is clear. *R. v. Port of London Authority Ex parte Kynoch Ltd.* (2), [1919] 1 K.B. 176; *R. v. Torquay Licensing Justices* (3), [1951] 2 All E.R. 656. In passing, it may be remarked that in so far as art. II of the interterritorial agreement purports to limit the discretion of the Minister under s. 9 of the Ordinance, it cannot be effective until appropriate legislation amending s. 9 has been introduced. This may be the reason for the qualification contained in art. X of the agreement. In the instant case, however, the evidence was that the Minister did take into account the factors advanced to him by the appellant company, though he rejected these as of insignificant weight in comparison with what he regarded as the paramount importance of the policy in the public interest; and the learned judge certainly took into account the factors put before him by the appellant company.

It is obvious that the importance of different policies which different administrative bodies may adopt will vary to an infinite degree. A particular policy may be of comparatively trivial importance and easily displaced by other considerations—as, indeed, would seem to be the case of the policy considered in *R. v. Torquay Licensing Justice* (3). At the other extreme, it is easy to envisage a policy of overwhelming national importance, where very strong grounds indeed would have to be adduced to justify a departure from the policy. I cannot see that it is possible to lay down any standard for the displacement of a policy. Each case must be considered on its merits. Mr. Salter’s complaint in the instant case really is that the learned judge attached too much weight to the policy aspect—that he ought to have held that the considerations of policy were outweighed by the considerations of individual interest advanced by the appellant company.

That the learned judge was impressed by the importance of the policy is clear. He said, *inter alia*:

“I think that before deciding to relax the policy, having regard to the possible implications and repercussions in Kenya and in Tanganyika of such a step, the Minister would be justified in demanding that an exceptional case should be made out. . . . To justify a departure from that policy there must, I think, be exceptional grounds.”

I am quite unable to say the learned judge was wrong in taking this view of the matter. Indeed, I would respectfully agree that the evidence indicated that the importance of the policy to the public interest was such that very cogent grounds indeed must be adduced to justify a departure from it.

Mr. Salter submitted that the learned judge did not himself make any finding on the facts. But, with respect, I think it is clear that he did. After stating that he thought exceptional grounds must be shown to justify a departure from the policy, and considering the factors and arguments advanced by the appellant company, he says:

“Undoubtedly, the company has very good grounds for an increased allocation should the stage be reached under the interterritorial agreement where increases are justified, but I am unable to say that the appellant company has made out a case so exceptional as to justify deviation from Government policy.”

This, in my opinion, can only be read as a finding that the factors on the appellant company’s side of the scales do not outweigh the importance to the public interest of the policy of Government.

For these reasons I think the grounds of appeal set out in ground 1 of the memorandum of appeal must fail. As regards ground 2, I would only say that I see no reason to disagree with the learned judge on the facts.

I would accordingly dismiss the appeal with costs.

Sir Kenneth O’Connor P: I agree. The appeal is dismissed with costs.

Gould JA: I also agree.

Appeal dismissed.

For the appellant company:

CW Salter QC and JEL Bryson

For the respondent:

Bryan O’Donovan QC and Stephen Davies

For the appellant:

Advocates: *Bryson & Todd*, Mombasa

For the respondent:

The Attorney-General, Kenya

Sheikh Mohamed Bashir v The Commissioner of Income Tax

[1961] 1 EA 255 (CAN)

Division:	Court of Appeal at Nairobi
Date of ruling:	26 June 1961
Case Number:	11/1961 (P.C.)
Before:	Gould Ag V-P

[1] *Bankruptcy – Adjudication – Appeal – Receiving order made – Appeal dismissed – Leave sought to appeal to Privy Council – Adjudication after application for leave filed – Whether adjudication determines applicant's right to proceed with appeal – Bankruptcy Ordinance, s. 42 (b), s. 52 (4) and s. 102 (K).*

Editor's Summary

The applicant sought leave to appeal to the Privy Council against the dismissal of his appeal against the making of a receiving order against him by the Supreme Court. Within five days after filing the application, the applicant was adjudicated bankrupt, and a preliminary point was taken that the adjudication automatically determined the right of the applicant to proceed with his application and consequently with his appeal.

Held – the applicant had a vested right to appeal to the Court of Appeal against the receiving order and, provided the requisite conditions were fulfilled, from the Court of Appeal to the Privy Council; as there was nothing in the Bankruptcy Ordinance or Rules which took away that right upon adjudication, it was a right to which effect must be given.

Preliminary objection overruled.

Cases referred to:

- (1) *United Telephone Co. v. Bassano* (1886), 31 Ch. D. 630.
- (2) *Boaler v. Power*, [1910] 2 K.B. 229.

Ruling

The following ruling prepared by **Gould Ag V-P**: was read by direction of the court:

The applicant is seeking leave to appeal to the Privy Council against the dismissal by this court of his appeal against the making of a Receiving Order against him in bankruptcy by the Supreme Court of Kenya. The application was filed on June 2, 1961, and I was informed by counsel that the applicant was adjudicated bankrupt on June 7, 1961. In those circumstances I am requested to decide as a point preliminary to the application whether the right of the applicant to proceed with his application, and consequently with his appeal, is automatically determined by the adjudication.

The applicant had a vested right to appeal to this court against the receiving order, and, provided the requisite conditions are fulfilled, from this court to the Privy Council. Unless there is something in the Bankruptcy Ordinance or Rules which takes that right away upon adjudication it is a right to which effect must be given. The practical consideration that a bankrupt might well have difficulty in finding the necessary security for appeal does not affect the legal position.

No authority which is directly in point has been quoted to me. *United Telephone Co. v. Bassano* (1) (1886), 31 Ch. D. 630 decides only that a bankrupt may be permitted to proceed with an appeal in an action in which he is personally

affected by an injunction. I do not think that s. 42 (b) applies. That section enacts that property divisible among the creditors includes the capacity to take proceedings for exercising the bankrupt's powers over or in respect of property. Even though "property" includes things in action I think it would be too wide a construction to hold that the section embraced such matters as a right of appeal against a receiving order; such a decision would involve holding that a right of appeal against an adjudication order also was divisible among the creditors. I think also that s. 52 (4) is mere machinery to enable the trustee more easily to exercise control over those things in action which are available for the benefit of creditors. **A right of appeal given by the bankruptcy law itself (s. 102 of the Ordinance) to a person aggrieved, must surely be a right personal to the bankrupt when he is that person.**

Counsel for the Official Receiver relied upon *Boaler v. Power* (2), [1910] 2 K.B. 229 to support an argument that the only way in which a judgment debt, upon which a bankruptcy notice was issued, can be challenged is in the bankruptcy court and proceedings—he submitted that the appeal against the receiving order was in fact a challenge to the judgment debt. **As to that I would have thought that if the judgment debt could be challenged in the proceedings leading to the receiving order it could be challenged in the appeal therefrom.** I do not need to express a final opinion on that matter as, if anything turns upon the distinction between an attack upon the judgment debt and some other ground of appeal say of a procedural nature, that is a matter for the appeal proper, and not one to be decided at this juncture. **In my view, unless the applicant clearly has no status to ask for leave (and I do not find that to be the case) I must deal with his application in the light of the requirements of the relevant Order in Council.**

Preliminary objection overruled.

For the applicant:

K Bechgaard QC and SC Gautama

For the respondent:

HB Livingstone (Senior Assistant Legal Secretary, E.A. High Commission)

For the Official Receiver:

DD Charters (Deputy Official Receiver, Kenya)

For the applicant:

Advocates: *Satish Gautama*, Nairobi

For the respondent:

The Legal Secretary, E.A. High Commission

Union Assurance Society Ltd v Ian Robert Ainscow
[1961] 1 EA 257 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 26 June 1961

Case Number: 104/1960
Before: Sir Kenneth O'Connor P, Crawshaw and Newbold JJA
Appeal from: H.M. Supreme Court of Kenya–Connell, J

[1] Insurance – Motor insurance – Third-party risks – Whether voluntary passenger insured for extra premium required to be covered by policy – Liability of insurer to satisfy judgment against insured – Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap. 233), s. 4, s. 5 and s. 10 (1) (K.) – Civil Procedure (Revised) Rules, 1948, O. XX, r. 4 (K.).

Editor's Summary

The appellant company issued a motor vehicle third party risks policy whereby, subject to the terms of the policy, the insured was indemnified against sums which he would be legally liable to pay in certain events, including sums payable for bodily injury to a voluntary passenger (other than a member of the insured's household) travelling in the motor vehicle. For cover of a voluntary passenger an additional premium was paid. The respondent, who was not a member of the insured's household, received injuries as a voluntary passenger in a motor car driven by the insured and obtained judgment against the insured for damages and costs amounting to Shs. 45,483/-. The respondent when he commenced proceedings gave notice to the appellant company and on obtaining judgment he called upon the appellant company to satisfy it, but the appellant refused to do so on the ground that s. 10 (1) of the Motor Vehicles Insurance (Third Party Risks) Ordinance applies only to such liability as is required to be covered by s. 5 (b) of the Ordinance and that voluntary passengers were not required to be so covered. The respondent then sued the appellant company claiming a declaration that the appellant company was liable to satisfy the judgment. The trial judge granted the declaration asked for and the appellant company appealed. On appeal the point in issue was whether the judgment which the respondent had obtained against the insured was a judgment in respect of such liability as was required to be covered by a policy under s. 5 (b) of the Ordinance.

Held – the judgment obtained against the insured did not relate to a claim against which the insured was required to insure under s. 5 (b) of the Motor Vehicles Insurance Ordinance, and accordingly s. 10 (1) of the Ordinance was not applicable.

Appeal allowed.

Case referred to:

(1) *Barnet Group Hospital Management Committee v. Eagle Star Insurance Co. Ltd.*, [1959] 3 All E.R. 210.

Judgment

Newbold JA: read the following judgment of the court: This was an appeal from a judgment and decree of the Supreme Court of Kenya sitting at Nairobi whereby it was ordered that the appellant (then the defendant) do satisfy the judgment and decree obtained by the respondent (then the plaintiff) in Civil Case No. 629 of 1959 in the Supreme Court of Kenya

between the respondent and W. F. Careful, and do pay the costs of the respondent. On the termination of the argument we allowed the appeal, set aside the judgment and decree of the Supreme Court, at the request of the appellant, which regarded the issue as an important point of construction affecting insurance companies, made no order for costs either in the Supreme Court or on the appeal, and stated that we would give our reasons in writing.

No evidence was taken in the Supreme Court, the case being argued on agreed facts and exhibits. From these it appears that the broad facts were as follows:

The appellant was an insurance company and in the course of its business had issued a motor vehicle insurance policy to W. F. Careful (hereinafter called “the insured”) whereby the insured was, subject to the terms of the policy, indemnified against sums which he would be legally liable to pay in certain events, including sums payable for bodily injury to a voluntary passenger (other than a member of the insured’s household) travelling in the motor vehicle. In other words the policy was what is known as a Third Party Risks Policy including cover in respect of voluntary passengers (other than members of the insured’s household) for which an additional premium had been paid. On December 29, 1958, the respondent, who was not a member of the insured’s household, while a voluntary passenger in a motor vehicle driven by the insured, received injuries for which he sued, and in Civil Case No. 629 of 1959, obtained judgment against the insured for damages and costs amounting in all to Shs. 45,483/–, and a decree was accordingly extracted. On the same date as the respondent filed his suit against the insured he gave notice in writing to the appellant of the proceedings, as required by s. 10 (2) of the Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap. 233 of the Laws of Kenya) (hereinafter referred to as “the Ordinance”). On obtaining judgment the respondent called upon the appellant to satisfy it. The appellant refused to do so on the ground that s. 10 (1) of the Ordinance is applicable only to such liability as is required to be covered by a policy of insurance under para. (b) of s. 5 of the Ordinance and that voluntary passengers are not required to be so covered. The respondent then filed suit against the appellant claiming a declaration that the appellant was liable to satisfy the judgment and decree obtained in Civil Case No. 629 of 1959 and the learned judge of the Supreme Court gave judgment as set out above. From this judgment the appellant appealed to this court.

Under s. 4 of the Ordinance it is unlawful to use a motor vehicle on a road unless there is in force a policy of insurance complying with the requirements of the Ordinance. To act in contravention of that section is a criminal offence.

The relevant words of s. 5 and s. 10 (1) of the Ordinance are as follows:

“5. In order to comply with the requirements of the last preceding section the policy of insurance must be a policy which:

.....

- (b) insures such person, persons or classes of person as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

“Provided that a policy in terms of this section shall not be required to cover–

.....

- (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury

to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise; . . . ”

- “10. (1) If after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of s. 5 of this Ordinance (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then . . . the insure shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability . . . ”

In our view the sole point in this appeal was whether the judgment which the respondent had obtained against the insured was a

“judgment in respect of such liability as is required to be covered by a policy under para. (b) of s. 5”

of the Ordinance. The learned judge in the Supreme Court, referring to certain observations of Salmon, J., in *Barnet Group Hospital Management Committee v. Eagle Star Insurance Co. Ltd.* (1), [1959] 3 All E.R. 210, on a similar provision in the English law, considered that these observations meant that where the policy covered a liability in respect of a person who could have been excluded but in fact was not excluded and judgment was obtained in respect of such a liability, then the liability was one required to be covered under para. (b) of s. 5. The learned judge concluded his judgment as follows:

“In my judgment I should follow the dicta of Salmon, J., and I hold that the plaintiff, not being excluded, the instant policy complies with the requirements of the Ordinance under s. 5 and that the judgment obtained against a person insured by the policy is in respect of a liability as is required to be covered, is covered in the sense that it is not excluded, by a policy issued under Ch. 233. I make the declaration as prayed with costs.”

With respect to the learned judge, we did not understand Salmon, J., to mean what the learned judge thought—indeed quite the reverse.

Mr. Salter, who appeared for the respondent, submitted that having regard to the background and objects of Cap. 233, s. 10 (1) should be construed in such a manner as to enable any injured person who had obtained a judgment in respect of a risk covered by a policy to sue the insurance company directly. Having regard to the clear words of s. 10 (1) which refer to a liability required to be covered, we did not agree. He argued that the proviso to s. 5 merely meant that an offence would not be committed under s. 4 if cover for voluntary passengers was not obtained; but that would not affect the right of a voluntary passenger for whom cover had, in fact, been obtained, to sue the insured under s. 10 (1). He emphasised that the effect of the proviso could be excluded by agreement, with the result the paragraph should be read as if the proviso did not exist. This is the view which appears to have found favour with the learned judge. With respect to the learned judge and to the argument, we failed to see how a liability, which by the proviso (which forms part of the section and must be read with para. (b) as a whole) is expressly stated not to be required to be covered, could be said to be a liability required to be covered, and, as stated above, we allowed the appeal.

Before leaving the case we desire, with respect, to draw the attention of the learned judge to O. XX, r. 4 of the Civil Procedure (Revised) Rules, 1948, with which, with respect, his judgment does not comply. The judgment contains

no concise statement of the case or of the points for determination, and a perusal of it does not give any clear indication of what the case is about.

Appeal allowed.

For the appellant:

M Berryman QC (of the English Bar) and *JA Mackie-Robertson*

For the respondent:

CW Salter QC and *JK Winayak*

For the appellant:

Advocates: *Kaplan & Stratton*, Nairobi

For the respondent:

Johor & Winayak, Nairobi

Fransio Matovu v R
[1961] 1 EA 260 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	9 June 1961
Case Number:	43/1961
Before:	Sir Kenneth O'Connor P, Gould Ag V-P and Newbold JA
Appeal from:	H.M. High Court of Uganda–Lewis, J

[1] *Criminal law – Evidence – Child – No finding by judge as to child's intelligence or understanding of duty to tell truth – Criminal Procedure Code, s. 149 (3) (U.) – Criminal Procedure Code (Amendment) Ordinance, 1959, s. 5 (U.).*

[2] *Criminal law – Evidence – Admissibility – Ruling – Statement by accused to police – Trial within trial – When ruling on admissibility should be given.*

Editor's Summary

The appellant unsuccessfully appealed against conviction for murdering his wife. The Court of Appeal, however, commented upon two features of the trial. First, one of the witnesses was a boy of eight years old who was permitted to give unsworn evidence but there was no finding on the record as to the boy's intelligence or his understanding of the duty to tell the truth, nor was there anything indicating a direction to the assessors or to the judge himself that the boy's evidence required corroboration. Secondly, the

judge reserved until the close of the prosecution case his ruling on the admissibility of the appellant's statement to the police.

Held –

- (i) a judge when confronted with a child of tender years called to give evidence, should himself question the child to ascertain whether he or she understands the nature of an oath and, if he does not allow the child to be sworn, he should record whether, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of telling the truth.
- (ii) where the child is a prosecution witness, the judge should also direct the assessors and himself that the child's evidence requires corroboration.
- (iii) the proper stage at which to deliver a decision as to the admissibility of a statement is at the close of the "trial within a trial" before the jury or the assessors return to court.

Appeal dismissed.

Cases referred to:

- (1) *R. v. Saidi s/o Nakandu* (1948), 15 E.A.C.A. 110.
- (2) *Otianga v. R.*, E.A.C.A. Criminal Appeal No. 46 of 1960 (unreported).
- (3) *Erukana Kyakulagira v. Attorney-General of Uganda*, [1959] E.A. 152 (C.A.).

Judgement

Sir Kenneth O'Connor P: read the following judgment of the court:

The appellant was convicted by the High Court of Uganda on March 13, 1961, of murdering his wife, Nampindi, at Kitwangwe, Buganda on January 1, 1961. Against that decision he appealed to this court. We dismissed the appeal on May 31, 1961, and now give our reasons.

Nampindi was the wife of the appellant by native custom. He had been living with Nampindi for about three years, during which time he had had a woman, Ngalonsa, and after she left, one Bayikala. He had also had other women for short periods. The motive alleged for the crime was that the appellant had become, or was becoming, sexually impotent with women other than Nampindi. He believed that Nampindi had cast a spell on him. Accordingly, he inflicted seven savage wounds upon her head, neck and arm with a panga, penetrating the brain and severing the spine and both bones of the right forearm.

The appellant made a statement to the police which the prosecution sought to adduce at the trial. The defence challenged the admissibility of this statement on the ground that it had been procured by a promise of advantage held out to the appellant by the police officer who took it. A "trial within a trial" was held to test its admissibility. The learned trial judge reserved his decision on its admissibility. He gave his decision at the end of the prosecution case, ruling that the statement was inadmissible. He said that he would give his reasons for so ruling in his judgment, and did so.

The appellant did not deny that he killed Nampindi. In an unsworn statement he said that he had had no previous intention of quarrelling with her, but that they had had much beer that day: when it had become dark, he had asked her for sexual intercourse but she had refused: he had become furious and gone for a stick: by mistake he had seized a panga and beaten her with it: he was very drunk.

The learned judge correctly held that refusal of sexual intercourse by a wife could not per se amount to legal provocation so as to reduce murder to manslaughter: *R. v. Saidi s/o Nakandu* (1) (1948), 15 E.A.C.A. 110. Both assessors and the learned judge rejected the defence of drunkenness. On appeal the appellant again alleged that he had committed the offence when "totally drunk". We saw no reason for thinking that the learned judge and the assessors had come to a wrong conclusion on the question of drunkenness and, as this was the only issue raised on the appeal, we (as already stated) dismissed it.

Before leaving the case there are two matters upon which we feel that we should comment:

One of the prosecution witnesses was a boy named Iga. According to the record, the voir dire is as follows:

"Iga s/o Lubega: I do not know my age. I do not go to school or church. I know what it means to tell the truth and that one gets into trouble when one lies.

"Court: Boy can give unsworn evidence. Seems about eight years old."

Iga's evidence was material both as to the attack on Nampindi and as to whether the appellant had been drinking.

We draw the attention of the learned judge to the provisions of sub-s. (3) of s. 149 of the Criminal Procedure Code as amended by s. 5 of the Criminal Procedure Code (Amendment) Ordinance, 1959. That sub-section reads:

"(3) Where, in any proceedings any child of tender years called as a witness does not, in the opinion of the

court, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the

reception of the evidence, and understands the duty of speaking the truth:

“Provided that where evidence admitted by virtue of this sub-section is given on behalf of the prosecution the accused shall not be liable to be convicted unless such evidence is corroborated by some other material evidence in support thereof.”

A judge, when confronted with a child of tender years called to give evidence, should himself question the child to ascertain whether he or she understands the nature of an oath, and, if the judge does not allow the child to be sworn, he should record whether, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of telling the truth. Where the child is a prosecution witness, a judge should also direct the assessors and himself that the child's evidence requires corroboration. In the present case the learned judge did examine Iga as to his age and whether he went to school or church and his understanding of the duty of telling the truth; but, except in so far as it is implicit in the judge's permission for Iga to give evidence, there is no finding as to the child's intelligence or his understanding of the duty of telling the truth and there is nothing in the recorded heads of the summing-up or in the judgment to indicate a direction to the assessors or to the judge himself that Iga's evidence required corroboration. This is not of great importance in the present case, the assault on Nampindi being admitted; but in another case failure to observe the provisions of s. 149 and to record compliance with them might result in the conviction being unsustainable. We draw attention to *Otianga v. R.* (2), E.A.C.A. Criminal Appeal No. 46 of 1960 (unreported); and to *Erukana Kyakulagira v. Attorney-General, Uganda* (3), [1959] E.A. 152 (C.A.) 155.

The other matter upon which we have been asked to comment is the reservation until after the close of the prosecution case of the learned judge's ruling on the admissibility of the appellant's statement to the police. There may have been reasons for this in this case; but it is not a practice which should be followed. The proper stage at which to deliver a decision as to the admissibility of a statement is at the close of the “trial within a trial” before the jury or the assessors return to court. At least the decision whether the statement may or may not be admitted and whether the witness who took it may or may not be examined as to the circumstances in which he took it should then be announced. If it is necessary to give written reasons and these are not ready, these can be given in the judgment. The decision whether a statement is admissible or not may affect the conduct of the trial and if a decision is postponed until the close of the prosecution case, the prosecution are left in doubt and may think it necessary to call witnesses which they would not call if the statement had been admitted. Or they may neglect to call evidence which they should have called. The conduct of the case by either or both parties may be materially affected if a decision on the admission or exclusion of a statement is not given at the proper time.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

KT Fuad (Crown Counsel, Uganda)

For the respondent:

Advocates: *The Attorney-General*, Uganda

For the respondent:

R v Mohanlal Ramji Popat
[1961] 1 EA 263 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 19 June 1961
Case Number: 40/1961
Before: Sir Kenneth O'Connor P, Gould Ag V-P and Newbold JA
Appeal from: H.M. Supreme Court of Kenya—MacDuff and Wicks, JJ

[1] *Evidence – Burden of proof – Burden of proof placed on accused by law – Quantum of proof required to discharge such burden – Bankruptcy Ordinance (Cap. 30). s. 137 (1) (t) and s. 147 (K.) – Indian Evidence Act, 1872, s. 105 – Evidence Act (Amendment) Ordinance (Cap. 12), s. 3 (K.).*

[2] *Criminal law – Charge – Bankruptcy offence – Duplicity – Contracting “any debt” – Bankruptcy Ordinance (Cap. 30), s. 137 (1) (t) (K.).*

Editor’s Summary

The respondent had appealed against his conviction by a magistrate on five counts under s. 137 (1) (t) of the Bankruptcy Ordinance of contracting a debt provable in bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation of being able to pay it. At the trial the respondent gave no evidence and made no statement on his own behalf. The Supreme Court allowed the respondent’s appeal holding that if the magistrate had properly taken certain facts into account, he would have come to the conclusion that the onus of showing that the respondent had a reasonable or probable ground of expectation of being able to pay each of the specific debts had been discharged on the prosecution evidence itself at least to the extent of raising a reasonable doubt as to his guilt. From this decision the Crown appealed and it was submitted that by s. 137 (1) (t) of the Bankruptcy Ordinance, the burden of proving a reasonable or probable ground of expectation of ability to pay was cast on the respondent and that it is not enough that there is a reasonable doubt; further that issue is whether the accused had discharged that onus by making out a *prima facie* case. It was also submitted that on two counts there was no evidence except that the respondent had incurred the debts and had not repaid them and there was, therefore, no evidence on which the Supreme Court could hold that, as regards these counts, the respondent had discharged the onus upon him. The respondent contended *inter alia* that the charges preferred against him were imprecise and duplex.

Held –

- (i) it was for the respondent to establish on a balance of probabilities *prima facie* that he had a reasonable or probable ground of expectation of paying each of the debts charged and, if that was established, then the onus shifted on the prosecution of proving each charge beyond reasonable doubt. *Ali Ahmed Saleh Amagara v. R.*, [1959] E.A. 654 (C.A) applied.

- (ii) in the case of certain counts there was prosecution evidence which the Supreme Court considered amounted to a *prima facie* case that the respondent had a reasonable or probable expectation of paying the debts and, as the prosecution (to whom the onus had then shifted) had not proved the case against the respondent beyond reasonable doubt, the convictions on these counts were rightly set aside.
- (iii) there was no evidence on which a *prima facie* case of reasonable or probable expectation of ability to pay the debts charged in two other counts could be said to be established and accordingly the conviction of the respondent on those counts should not have been interfered with on that ground.

- (iv) the wording of s. 137 (1) (t) of the Bankruptcy Ordinance points to the contracting of a specific debt and not to indebtedness on a balance of account; since one count related to a total of two debts incurred at different times and another count related to amounts due for milk over three months, these counts were bad for duplicity and were not curable under s. 147 of the Ordinance.

Appeal dismissed.

Cases referred to:

- (1) *Ali Ahmed Saleh Amgara v. R.*, [1959] E.A. 654 (C.A).
(2) *Riddlesbarger v. Robson*, [1959] E.A. 841 (C.A.).

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court:

On November 25, 1960, the respondent was convicted by the resident magistrate, Nakuru, on five counts under s. 137 (1) (t) of the Bankruptcy Ordinance (Cap. 30 of the Laws of Kenya) of contracting a debt provable in bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation of being able to pay it. He was sentenced to six months' imprisonment on each count, the sentences to run consecutively. On March 3, 1961, the Supreme Court allowed his appeal and set aside the convictions and sentences. From the decision of the Supreme Court the Crown now appeals to this court.

The respondent was the owner of a grocer's shop and an Asian hotel in Nakuru.

The particulars of each of the charges were in the following form:

"Particulars of Offence.

"That Mohanlal Ramji Popat being a person in respect of whose estate a receiving order was made by Her Majesty's Supreme Court of Kenya at Nairobi on the 25th day of June, 1959, in Bankruptcy Cause No. 50 of 1959, unlawfully did in (and here follow the names of the months) in 1959 contract a debt provable in bankruptcy in that he purchased goods worth Shs.: (and here follows the sum in figures) on credit from (and here is set out the individual or firm by name) without having at the time he contracted the said debt any reasonable or probable ground of expectation of being able to pay it."

The sum mentioned is in each case the balance due from the respondent to his wholesaler for goods supplied. The evidence of the respondent's financial position as accepted by the magistrate showed a steadily worsening position from the beginning of 1958 to the middle of 1959, ending with a real deficiency of assets compared with liabilities of about Shs. 50,000/-.

At the trial before the magistrate the respondent elected to give no evidence and to make no statement on his own behalf.

Their lordships in their judgment in the Supreme Court pointed out that the accounts showed that the respondent had made payments on account in respect of counts 8 and 10 and that, as regards count 5 which was an account for milk supplied, the respondent had been dealing with the supplier on a month to month basis and had, in April, paid his account for milk supplied in February. Their lordships said that the magistrate in coming to his finding that when the respondent contracted each debt he had no

reasonable or probable

ground of expectation of being able to pay it, seemed to have given little, if any, weight to those facts. Their lordships continued:

“It is true that the appellant was trading while insolvent in the early part of 1959 when these debts were incurred. However if he were allowed to continue to trade he would ordinarily have had a reasonable expectation of being able to pay a debt incurred out of his subsequent takings. That this is apparent is evidenced by the payments he did make. It may be that the appellant was making use of sales of supplies from later creditors for the purpose of paying earlier ones. Under para. (t) of s. 137 (1) the charge is related to contracting a specific debt and while the appellant continued trading he could logically, although he was insolvent, have a reasonable or probable ground of expectation of paying that specific debt, albeit at the expense of later acquired creditors.

“Again when considering the real issue in this case it appears to us that insufficient notice was taken of the fact that the appellant did not cease trading of his own accord. This was not a case where a trader voluntarily ceased trading and prior to doing so contracted a number of debts. In the present case the appellant was contracting debts for goods which he was using in his business and in June his business was taken from him.

“We are of the opinion that had the learned magistrate properly taken into account the facts to which we have referred he must necessarily have come to the conclusion that the onus of showing that the appellant had reasonable or probable ground of expectation of being able to pay each one of these specific debts had been discharged on the prosecution evidence itself at least to the extent of raising a reasonable doubt as to his guilt.”

It is this passage which was principally attacked by the learned counsel who appeared for the appellant. He argued that, by s. 137 (1) (t) of the Bankruptcy Ordinance, the burden of proving a reasonable or probable ground of expectation of being able to pay the debt was cast on the respondent and that where by statute an onus is placed on an accused person, it is not enough to say that there is a reasonable doubt: the question is “has the accused discharged that onus by raising a *prima facie* case”? Counsel referred to s. 105 of the Indian Evidence Act as substituted by s. 3 of the Evidence Act (Amendment) Ordinance (Cap. 12 of the Laws of Kenya). He argued that on two of the counts (Nos. 7 and 11) there was no evidence except that the respondent had incurred the debts and had not repaid them: there was, therefore, no evidence on which the learned judges could hold, as regards those counts, that the respondent had discharged the onus cast upon him.

Ali Ahmed Saleh Amgara v. R. (1), [1959] E.A. 654 (C.A.) was a case on s. 167 (b) of the East African Customs Management Act, 1952, whereby the onus of proving lawful importation was cast upon the person prosecuted. An extract from the judgment of this court at p. 658 reads:

“Where, as in the instant case, there is a specific provision in a statute placing the burden of proof regarding a particular matter on the person accused, there is no need for the prosecution to rely upon s. 105 of the Indian Evidence Act and we think that the application of that section must be excluded, even though it would otherwise have been applicable, and that the principles of English law would apply. Nevertheless, even if it might be thought that by analogy the degree of the burden on the accused should be drawn from s. 105, we do not think that there is any material difference between s. 105 of the Evidence Act and the English law on the point. The position under English law is stated in Phipson on Evidence (9th Edn.) at p. 38 as follows:

‘When, however, the burden of an issue is upon the accused, he is not in general, called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeed in proving a *prima facie* case, for then the burden is shifted to the prosecution, which has still to discharge its original onus that never shifts, i.e. that of establishing, on the whole case, guilt beyond a reasonable doubt.’

“We accept that statement of the law. In *R. v. Carr-Briant* (1943) K.B. 607, which is one of the cases cited in Phipson in support of the proposition just stated (and is also cited in the commentary on s. 105 of the Indian Evidence Act in Sarkar on Evidence (9th Edn.) at p. 808) the Court of Criminal Appeal said, at p. 612:

‘In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person “unless the contrary is proved”, the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.’

“We would respectfully agree with this view . . . It still, of course, remains for the court to be satisfied beyond reasonable doubt as to the guilt of the accused on the whole of the evidence and this, in substance, is all that is enacted by the second proviso to s. 105 of the Indian Evidence Act.”

We think that these principles apply to the present case.

It was for the respondent to establish on balance of probabilities *prima facie* that he had a reasonable or probable ground of expectation of paying each of the debts charged. This could have been done either out of the mouths of the prosecution witnesses or from other prosecution evidence or by evidence given by the defence. The onus would then shift to the prosecution of proving each charge beyond reasonable doubt. In the present case there was no evidence at all given by the defence and there was no evidence given by the prosecution on which a *prima facie* case of reasonable or probable expectation of ability to pay the debts charged in counts 7 and 11 could be said to be established. Accordingly, the conviction of the respondent on those counts should not have been interfered with on that ground. There was prosecution evidence which the learned judges considered amounted to a *prima facie* case that the respondent had a reasonable or probable expectation of paying the debts charged in counts 5, 8 and 10. The learned judges, since they were of opinion that the prosecution (to whom the onus had then shifted) had not proved the case against the respondent beyond reasonable doubt, rightly set aside the conviction on those counts.

Another ground of appeal raised by the appellant was that the learned judges of the Supreme Court had erred in law in failing to construe the words “reasonable or probable ground of expectation” as limiting the extent to which an insolvent debtor could expect to pay his debts at the expense of his after-acquired creditors. We agree that the above quoted passage is too widely stated. There is a stage at which commercial optimism regarding ability to pay existing debts provided the business continues, and the payment of existing debts from the moneys of after-acquired creditors becomes the dishonesty aimed at by para. (t) of s. 137 (1). While it is, no doubt, to some extent ordinary business usage to expect to pay existing debts from subsequent profits, if the only way of paying an existing debt is by incurring a further debt which there

is no reasonable or probable ground of expectation of being able to pay except by incurring another debt, then, in our opinion, that falls within the mischief of the paragraph. It could not have been the intention of the legislature in enacting para. (t) to impose no limit on the extent to which Peter may be robbed to pay Paul. It is a matter of degree. If there is a reasonable or probable expectation of being able to pay an existing debt in the ordinary course of business, then that does not fall within the paragraph. It is not an answer, however, to a charge under the section for a man who knew himself to be hopelessly insolvent to say that he expected to swindle someone into supplying him with goods which he could sell to pay the existing debt. That is not, in our view, a “reasonable or probable ground of expectation of being able to pay” the debt within the meaning of the paragraph.

Counsel for the respondent raised two points with which we must deal. He argued that the appeal to this court had not been brought or sanctioned by the Attorney-General and that the charges, which charged a lump sum, were imprecise and duplex.

With regard to the first point, the memorandum of appeal purported to be an appeal by the Queen and was signed by Mr. Charters who was styled “Advocate for the appellant”. We were assured from the Bar that in fact the Attorney-General had sanctioned the appeal after discussion with the Official Receiver and that Mr. Charters is a Crown Counsel seconded to the Official Receiver’s department. We are of opinion that we can accept this assurance and that the appeal was in fact the appeal of the Crown acting through the Attorney-General by whom alone a second appeal can be brought: *Riddlesbarger v. Robson* (2), [1959] E.A. 841 (C.A.) at p. 846.

Regarding the second point, we think that the words of para. (t) of s. 137 (1)

“If he has contracted any debt . . . without having at the time of contracting it . . .”

point to the contracting of a specific debt and not to indebtedness on a balance of account. The evidence shows that the sum charged in count 7 was a total of two debts incurred at different times. The sum charged in count 11 is made up of various small sums due for milk supplied over a period of three months. The account seems to have been payable monthly. Whether a debt was contracted with each delivery or monthly, the amount owed as a result of three months’ deliveries did not arise from a single debt. In our opinion each of these counts was duplex and they were not cured by s. 147 of the Ordinance. That section allows the substance of the offence to be charged in the words of the Ordinance without setting forth any debt, but does not allow two or more offences to be charged in one count. In our opinion this is fatal to the conviction on counts 7 and 11.

In the result, the appeal fails and the order of the Supreme Court setting aside the convictions and sentences is maintained, though not for precisely the same reasons.

Appeal dismissed.

For the appellant:

Bryan O’Donovan QC and VBL Sharma (Deputy Official Receiver, Kenya)

For the respondent:

FRS de Souza

For the appellant:

Advocates: *The Official Receiver*, Kenya

For the respondent:
FRS De Souza & Co, Nairobi

WGB Phillips v R
[1961] 1 EA 268 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment: 28 April 1961
Case Number: 127/1961
Before: Sir Ralph Windham, CJ

[1] Criminal law – Witness – Failing to attend in a judicial proceeding – Summons to give evidence at inquest – Witness attending but departing before inquest begun – Whether an offence is created by Criminal Procedure Code, s. 150 (1) (T.) – Penal Code, s. 114 (1) (T.).

Editor’s Summary

The appellant who was summoned to give evidence at an inquest duly appeared at the court at 9.00 a.m. on the date required but when the magistrate did not arrive he went away at 10 a.m. Subsequently the appellant was charged with “failing to attend in a judicial proceeding” contrary to s. 150 (1) of the Criminal Procedure Code. On a plea of guilty the appellant was fined Shs. 200/-. He appealed against the severity of the sentence only but the court exercising revisional jurisdiction reviewed the decision of the magistrate.

Held –

- (i) s. 150 (1) of the Criminal Procedure Code does not create a criminal offence but gives the court power to deal summarily with a witness who has absented himself without lawful excuse by the imposition of a fine.
- (ii) the magistrate had power under s. 150 of the Code to impose a fine on the appellant for what he did, but the framing of a criminal charge and conviction of the appellant under that section were wholly misconceived, and the proceedings and conviction were a nullity.

Conviction quashed.

No cases referred to in judgment

Judgment

Sir Ralph Windham CJ: The appellant was a witness duly summoned to give evidence before the resident magistrate at an inquest in the district court of Chunya at 9 a.m. on February 21, 1961. He duly appeared a little before 9 a.m. and waited at the court until 10 a.m., at which hour, the resident magistrate

having not yet arrived at his court, the appellant decided to wait no longer, and went away. He came back to the court at 4 p.m. by which time the learned resident magistrate had arrived and departed again. Two days later, he was charged, before the same magistrate, with “failing to attend in a judicial proceeding” contrary to s. 150 (1) of the Criminal Procedure Code. To this charge he pleaded guilty, and the learned magistrate, after formally finding him guilty on his own plea, recorded the following observations in passing sentence:

“I take a serious view of this. Accused was legally summoned and by his stupid and rude actions, which surprise me, considering his position, he has put the court to considerable inconvenience. A judicial proceeding has had to be postponed because of his absence. Fined Shs. 200/- or distress.”

This appeal is against the severity of the sentence only. But this court has power to review the question whether it was open to the prosecution and the learned trial magistrate to frame a formal charge under s. 150 (1) of the Criminal Procedure Code at all, and to convict the appellant of a criminal offence under that section.

Section 150 of the Criminal Procedure Code, a section whose source (if any) I am unable to trace, provides as follows:–

- “150 (1) Any person summoned to attend as a witness who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the court, or fails to attend after adjournment of the court after being ordered to attend, shall be liable by order of the court to a fine not exceeding four hundred shillings.
- “(2) Such fine shall be levied by attachment and sale of any movable property belonging to such witness within the local limits of the jurisdiction of such court.
- “(3) In default of recovery of the fine by attachment and sale the witness may, by order of the court, be imprisoned as a civil prisoner for a term of fifteen days unless such fine is paid before the end of the said term.
- “(4) For good cause shown, the High Court may remit or reduce any fine imposed under this section by a subordinate court.”

The question that immediately arises is whether s. 150 creates a criminal offence at all, such as can be made the subject of a charge upon which a person can be convicted. Upon a careful consideration of its provisions I do not think the section can be properly so construed. What it does is to give the court power to deal summarily with a witness who has absented himself without lawful excuse, by imposing a fine on him. Both natural justice and the qualification regarding lawful excuse require that the witness shall be given the opportunity of being heard; but subject to that, the procedure under the section is in no way equated to that applicable to the trial of a criminal offence. The act of the appellant in the present case might, indeed, have been treated as a criminal offence, since it might have been made the subject of a charge under para. (i) of s. 114 (1) of the Penal Code, which specifically provides that the form of contempt of court which consists of committing “intentional disrespect to any judicial proceeding” shall be a misdemeanour, punishable with imprisonment or a fine. But the appellant’s act was not so dealt with. And s. 150 of the Criminal Procedure Code nowhere provides that the non-attendance of a witness without lawful excuse, as dealt with in the section, shall be a criminal offence of any kind. Certainly the power given to the court under the section to visit such an act with a fine does not of itself mean, by any necessary implication, that the act is a crime. Moreover a statute will not be held to create a criminal offence unless it does so in the clearest terms. Section 150 (1) provides that the witness “shall be liable by order of the court to a fine”. There is no suggestion that he must first be convicted. Again, s. 150 (3) clearly contemplates that the procedure under the section is not criminal, for it provides that if the fine imposed cannot be recovered, the witness may be imprisoned “as a civil prisoner”. A person convicted of a criminal offence who fails to pay a fine imposed upon him is imprisoned not as a civil prisoner but as a criminal prisoner, under a default term. Lastly, the peculiar provision in s. 150 (4) that

“for good cause shown, the High Court may remit or reduce any fine imposed under this section by a subordinate court”

would have been redundant if the section were creating an offence, since in that case the ordinary provisions of the Ordinance regarding appeals to, and revisions by, the High Court would have applied.

I accordingly hold that, while the learned trial magistrate certainly had power under s. 150 to impose a fine on the appellant for what he did, the framing of a criminal charge under that section and the conviction of the appellant of an

offence under it were wholly misconceived, and the proceedings and conviction were a nullity. I therefore so declare, and I quash the conviction.

With regard to the fine, it was, as I say, properly imposed under the section, and the only question that remains is whether a fine of Shs. 200/- was manifestly too high. Upon careful consideration I think that it was. If the appellant had deliberately not turned up at court at all on the day in question, then such a fine would not have been excessive. But he did turn up at the hour stated, 9 a.m., and remained there for an hour, waiting in vain for the court to sit. Being a busy man (he was an Inspector of Mines) he then went about his business, against the advice of the police officer in charge, it is true; but at 4 p.m. he returned to court in order to tender his apologies for his disrespect, only to find that the court had risen. Two days later, when the summons had already been issued against him, he again attempted to tender his apologies, but the magistrate refused to see him. His absence had caused the case in which he should have testified to be adjourned, as the learned magistrate observed, and, as he likewise observed, his action no doubt had been "stupid and rude". But I think a fine of Shs. 100/- would have been ample, particularly in view of the appellant's having returned to court to tender his apologies, a factor not mentioned by the learned magistrate in assessing the fine. I accordingly reduce the fine of Shs. 200/- to one of Shs. 100/-.

Conviction quashed.

The appellant in person.

For the respondent:

MGK Konstam (Crown Counsel, Tanganyika)

For the respondent:

The Attorney-General, Tanganyika

Rajabali Hassam and another v Raza Hassanali Manji Haji and another [1961] 1 EA 270 (HCZ)

Division:	HM High Court of Zanzibar at Zanzibar
Date of judgment:	17 April 1961
Case Number:	2/1960
Before:	Mahon J

[1] Estoppel – Estoppel by conduct – Guarantee of debt for consideration – Consideration consisting of time and instalments – Proof of claim lodged and admitted – Debtors adjudged insolvent – Part Payment received – Action for balance against guarantors – Whether creditor estopped from claiming balance – Evidence Decree (Cap. 10), s. 115 (Z.).

Editor's Summary

Certain debtors owed the plaintiffs Shs. 27,791/02 and by a written agreement made between the debtors, the defendants and the plaintiffs, the defendants, in consideration of the plaintiffs giving the debtors time to pay and accepting payment by instalments, jointly and severally guaranteed payment of the aforesaid sum. Later the debtors who had not paid any instalment were adjudged insolvent. The plaintiff filed a proof of debt and received from the Official Assignee Shs. 10,298/30. The plaintiffs then filed an action to recover the balance of Shs. 17,492/72 from the defendants. It was argued that the plaintiffs were estopped from claiming this sum.

Held –

- (i) no question of election arose in the instant case and the provisions of s. 115 of the Evidence Decree were not applicable.
- (ii) the plaintiffs by proving their claim against the estate of the debtors did

not lead the defendants to believe that they were abandoning their right to recover from the defendants, and accordingly the plaintiffs were not estopped from claiming the balance.

Judgment for the plaintiffs.

Cases referred to:

(1) *Meherbai Jamshedji Darukhanwala v. Harsukh Amichand Jetha Gandhi*, Zanzibar First Class Subordinate Court Civil Case No. 378 of 1959 (unreported).

(2) *Scarf v. Jardine* (1882), 7 App. Cas. 345.

Judgment

Mahon J: In this suit the facts are that three persons, namely, Gulamali Manji Haji, Hassanali Manji and Huseinali Manji Haji, hereinafter called the debtors were carrying on business in Zanzibar under the name of Manjibhai Haji.

In January of 1957 the debtors owed the plaintiffs Shs. 27,791/02. By an agreement in writing dated January 22, 1957, made between the debtors, the defendants and the plaintiffs, the defendants in consideration of the plaintiffs agreeing to give the debtors time to pay this sum and for their accepting payment by instalments, jointly and severally guaranteed payment of this Shs. 27,791/02 by the debtors to the plaintiffs in the manner set out in the agreement. No instalment under this agreement has been paid.

In March, 1957, the debtors were adjudged insolvent by order of this court and their property was vested in the Official Assignee. The plaintiffs duly filed a proof of debt and received from the Official Assignee a total sum of Shs. 10,298/30. They now seek by this suit to recover the balance due to them, namely, Shs. 17,492/72 from the defendants.

The facts as pleaded are not in dispute and the only question for decision is whether or not the plaintiffs are estopped from claiming this sum.

Learned counsel for the defendants relies on the decision in *Meherbai Jamshedji Darukhanwala v. Harsukh Amichand Jetha Gandhi* (1), Zanzibar First Class Subordinate Court Civil Case No. 378 of 1959 (unreported). It appears from the judgment in that case that the plaintiff sued the defendant on a promissory note signed on behalf of a firm by the defendant as a partner. After signing the note the defendant ceased to be a partner of the firm. Some three years later the partners in the firm were adjudicated bankrupt on the petition of the plaintiff who filed a proof and received payment of 17 per cent. from the Official Assignee. It was submitted successfully that as the plaintiff had previously elected to take proceedings in insolvency against the firm of Amichand Jetha Gandhi her action was not maintainable.

The learned resident magistrate who tried that case held that the principle laid down in *Scarf v. Jardine* (2) (1882), 7 App. Cas. 345, was applicable to the facts as also was s. 115 of the Evidence Decree (Cap. 10).

I agree with learned counsel for the plaintiff that the facts in *Scarf's* case (2), are distinguishable from those in the case now before this court. In that case, to quote the headnote, a firm of two partners

dissolved: one retired and the other carried on the business with a new partner under the same style. A customer of the old firm sold and delivered goods to the new firm after the change but without notice of it. After receiving notice he sued the new firm for the price of the goods, and upon their bankruptcy proved against their estate, and afterwards brought an action for the price against the late partner:

Held, reversing the decision of the Court of Appeal, that the liability of the late partner was a liability of estoppel only and not jointly with the members of the new firm: that the customer might at his option have sued the late partner or the members of the new firm but could not sue all three together; and that having elected to sue the new firm he could not afterwards sue the late partner.

As I see it no question of election arose in the instant case and the provisions of s. 115 Evidence Decree (Cap. 10) do not apply. By proving against the estate of the debtors the plaintiffs cannot be said to have led the defendants to suppose that they were abandoning their right to recover against them should it become necessary.

The law which is applicable, in my view, is that stated in Mulla's Law of Insolvency in India (2nd Edn.) at p. 413, to which I have been referred. It is there stated that where payment of a debt is guaranteed, and the principal debtor becomes insolvent, the creditor can prove for the full amount of the debt and then recover from the surety the amount of deficiency after receipt of dividends out of the debtors' estate. That is precisely what has happened in this case. The plaintiffs received from the debtors' estate Shs. 10,298/30 and this amount has been deducted from the amount guaranteed in the agreement of January 22, 1957.

The plaintiffs are not, in my opinion, estopped from claiming this Shs. 17,492/72 from the defendants and I answer the one and only issue accordingly.

Judgment is, therefore, entered for the plaintiffs as prayed.

Judgment for the plaintiffs.

For the plaintiffs:

PS Talati

For the defendants:

AA Lakha

For the plaintiffs:

Advocates: *Wiggins & Stephens*, Zanzibar

For the defendant:

AA Lakha, Zanzibar

Salim Sawad v R
[1961] 1 EA 272 (HCU)

Division: HM High Court of Uganda

Date of judgment: 8 May 1961

Case Number: 627/1960

Before: Sir Audley McKisack CJ

[1] Criminal law – Plea – Equivocal admission when charge read – Whether magistrate entitled to enter plea of guilty – Mens rea – Specified Tribes (Registration of Residence and Removal) Ordinance, 1955, s. 12 (2) (U.).

Editor's Summary

Under s. 12 (2) of the Specified Tribes (Restriction and Removal) Ordinance, 1955, “any person who knowingly receives, harbours or conceals any member of a specified tribe unlawfully within the Protectorate or who aids or assists any member of a specified tribe unlawfully to enter or be within the Protectorate shall be guilty of an offence . . .” The appellant was charged with assisting certain persons by providing them with food and accommodation contrary to s. 12 (2) above. The magistrate entered a plea of guilty and convicted the appellant after recording this answer to the charge:

“I admit I gave these men food and accommodation in my house at Arua. When they were arrested I knew they were Kikuyu. They stayed with me two days. I now realise they were unlawfully within the Protectorate.”

On appeal it was contended by the Crown that knowledge that a person is a member of a specified tribe is an essential ingredient of the group of offences

which comprises receiving, harbouring or concealing, but not of the offence of aiding or assisting such person unlawfully to enter or be within the Protectorate.

Held –

- (i) as the word “knowingly” appears at the beginning of s. 12 (2) the whole sub-section must be construed as being governed by that word and the word “who”, where it occurs in the sub-section for the second time is a mere redundancy.
- (ii) from his answer to the charge it was clear that the appellant was not admitting that he knew the men in question to be Kikuyu before the time of their arrest, that he knew until “now” that these men were “unlawfully within the Protectorate”; accordingly a plea of not guilty ought to have been entered.

Appeal allowed.

No cases referred to in judgment

Judgment

The following judgment of **Sir Audley McKisack CJ**: was read by **Sheridan J**:

The appellant was convicted of contravening s. 12 (2) of the Specified Tribes (Restriction of Residence and Removal) Ordinance, 1955, and he was sentenced to six months’ imprisonment. He was allowed bail pending his appeal.

Section 12 (2) of the Ordinance is as follows:

“Any person who knowingly receives, harbours or conceals any member of a specified tribe unlawfully within the Protectorate or who aids or assists any member of a specified tribe unlawfully to enter or be within the Protectorate shall be guilty of an offence against this Ordinance and upon conviction shall be liable to be imprisoned for a period not exceeding three years.”

The particulars of the offence as laid in the charge aver that the appellant assisted certain persons who were members of the Kikuyu tribe unlawfully to be within the Protectorate by providing them with food and accommodation. (The Kikuyu tribe is a “specified tribe” within the meaning of the Ordinance.)

The learned magistrate entered a plea of guilty after recording the following answer by the appellant to the charge:

“I admit I gave these men food and accommodation in my house at Arua. When they were arrested I knew they were Kikuyu. They stayed with me two days. I now realise they were unlawfully within the Protectorate.”

From his answer to the charge it is clear that the appellant was not admitting that he knew the men in question to be Kikuyu before the time of their arrest; and he was not admitting that he knew until “now” that these men were “unlawfully within the Protectorate”.

Looking at s. 12 (2) of the Ordinance, one sees that the word “knowingly” appears before the verbs “receives, harbours or conceals . . .”, but does not occur in the expression “or who aids or assists”.

The Crown contends that, because of the way this sub-section is worded, knowledge that a person is a member of a specified tribe is an essential ingredient of the group of offences which comprises receiving,

harbouring or concealing, but not of the offences of aiding or assisting such person unlawfully to enter or be within the Protectorate.

Mr. Fuad for the Crown concedes that this is decidedly strange, particularly as one and the same punishment is provided for each type of offence.

I do not think that this construction can possibly have been intended by the legislature, as I can think of no reasonable explanation for mens rea being

essential to the first category of offence but not to the second. I am aware that, in construing a statute, a court must not import into it a word which is not found there, but the word “knowingly” is found in the sub-section at the beginning, and I think that the whole of the sub-section must be construed as being governed by that word; the word “who”, in the second place where it occurs, is a mere redundancy.

That being so, it is clear that the appellant’s answer to the charge was not an admission of the offence and a plea of not guilty ought to have been entered.

It is unnecessary for me to decide whether the provision of food and accommodation can, for the purposes of s. 12 (2) of the Ordinance, amount to assisting a person to be within the Protectorate.

The appeal must be allowed and the conviction and sentence set aside. I direct that, if the Attorney-General thinks fit, the appellant is to be retried.

Appeal allowed.

For the appellant:

AV Clerk

For the respondent:

KT Fuad (Crown Counsel, Uganda)

For the appellant:

Advocates: *Mayanja, Clerk & Co*, Kampala

For the respondent:

The Attorney-General, Uganda

Wiston s/o Mbaza v R
[1961] 1 EA 274 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	15 April 1961
Case Number:	11/1961
Before:	Law J

[1] Criminal law – Evidence – Accused electing not to give sworn evidence – Accused informed that adverse inference may be drawn – Whether magistrate should so inform accused – Misdirection – Penal Code, s. 311 (1) (T.) – Criminal Procedure Code, s. 206 (1) (T.).

Editor’s Summary

The appellant was convicted of retaining a wallet knowing the same to have been stolen. At the trial the accused elected not to give evidence on oath and the magistrate explained to him that an adverse inference could be drawn from his doing so. In his judgment also the magistrate observed that guilty knowledge could be inferred as the accused had elected to give an unsworn statement. On appeal.

Held –

- (i) there is no objection to a magistrate, when complying with s. 206 (1) of the Criminal Procedure Code, informing an accused that evidence on oath may carry more weight than an unsworn statement, but there is no justification for telling an accused that an adverse inference may be drawn from electing to make an unsworn statement.
- (ii) the magistrate's observation that guilty knowledge could be inferred from the accused electing to make an unsworn statement was a grave misdirection, but the magistrate would certainly have convicted the accused if he had properly directed himself.

Appeal dismissed.

Cases referred to:

- (1) *Yeremia Kalimedo v. R.* (1956), 23 E.A.C.A. 503.
- (2) *Omari s/o Hassani v. R.* (1956), 23 E.A.C.A. 580.

Judgment

Law J: The appellant was convicted in the district court of Songea District of the offence of retaining a wallet containing Shs. 153/-, knowing the same to have been stolen, contrary to s. 311 (1) Penal Code, and was sentenced to one year's imprisonment.

The complainant lost his wallet, containing Shs. 200/-, on November 16, 1960. He described it as being a black wallet, with his initial "k" inside, adding that near the initial there was a tear in the cloth. On November 21, the appellant was arrested. He was in possession of a wallet similar in every respect to that described by the complainant, and which contained Shs. 153/-.

The appellant's defence, made in an unsworn statement, was that the wallet and money were his own property, and he called as a witness a prison warder who deposed that when the appellant was released from prison on November 5, 1959, he was in possession of a black wallet and of Shs. 230/-.

The trial magistrate was convinced that the wallet found on the appellant on November 21, 1960, was the property of the complainant and convicted the appellant.

This finding of fact is supported by the evidence and there is no apparent reason why this court should come to any different conclusion.

There are however some passage in the trial magistrate's judgment which call for comment. In para. 8, he said:

"The accused person elected to give unsworn testimony, although the fact that an adverse inference could be drawn from this was fully explained to him."

By s. 206 (1) of the Criminal Procedure Code, the court has the duty of explaining to the accused that he has the right to give evidence on oath from the witness-box, in which case he will be liable to cross-examination, or to make a statement not on oath from the dock. In *Yeremia Kalimedo v. R.* (1) (1956), 23 E.A.C.A. 503, the judgment of the Court of Appeal contains the following passage:

"It is, of course, open to a trial judge to draw an inference adverse to the defence from the fact that the accused has elected . . . not to give evidence on oath."

The judgment goes on to make it clear that it is not an inference which is necessarily to be drawn in every case.

In my view, there is no objection to a magistrate, when complying with s. 206 (1) of the Criminal Procedure Code, saying that evidence on oath, which renders the accused liable to cross-examination, may carry more weight than a mere unsworn statement; but I doubt if there is any justification for telling the accused that an adverse inference may be drawn from an election to make an unsworn statement. This might unduly influence an accused person in the exercise of his right to choose between two alternative courses of conduct offered to him by statute, and it is not in every case necessarily to an accused person's advantage to give evidence on oath. Whilst on this subject, I wish to express my respectful disagreement with the terminology used by the Court of Appeal in *Omari s/o Hassani v. R.* (2) (1956), 23 E.A.C.A. 580, when they speak of an accused person's "refusal" to give evidence on oath. The use of the word "refusal" implies the existence of some sort of duty, and where a person is given the choice of two alternative statutory rights, without qualification, it cannot in my opinion be said that in electing to adopt one course, he is refusing to follow the other.

In para. 12 of the trial magistrate's judgment, the following appears:

"I consider that guilty knowledge can be inferred from his (i.e. the accused's) electing to give an unsworn statement."

This is a grave misdirection, and one which would be fatal to the conviction were I not certain, as I am, that the trial magistrate must have convicted on the evidence had he properly directed himself. There is no justification whatsoever for the proposition that guilty knowledge can be inferred from an election to make an unsworn statement. At the most, an adverse inference may be drawn from such an election, but magistrates should, in my view, hesitate before even drawing such an inference in the case of an undefended and uneducated accused person. This appeal fails, both as regards conviction and sentence, and is dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

WR Wickham (Crown Counsel, Tanganyika)

For the respondent:

The Attorney-General, Tanganyika

Emmanuel Mutakayana v R
[1961] 1 EA 276 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	15 May 1961
Case Number:	147/1961
Before:	Sir Audley McKisack CJ

[1] *Licensing – Offences – Evidence – Liquor supplied after permitted hours – No proof that beverage described by witnesses as “bear” was beer – Liquor Ordinance, 1960, s. 2, s. 16 (1) (a) and s. 28 (d) (U.).*

Editor's Summary

The appellant appealed against his conviction for supplying intoxicating liquor outside permitted hours contrary to s. 16 (1) (a) of the Liquor Ordinance, 1960. The evidence adduced by the prosecution was that two police officers at 12.15 a.m. at the appellant's bar saw a liquid which they referred to as “beer” being poured out of open bottles bearing the labels Nile, Bell and Tusker and supplied to people there. The magistrate relying on s. 28 (d) of the Ordinance found that the bottles marked Nile, Bell and Tusker

contained those brands of beer and held that it was notorious that European beers in Uganda contain more than 2% alcohol. On appeal

Held –

- (i) it was not necessary for the prosecution to prove that the “beer” of which the witnesses spoke contained more than two per centum by weight of absolute alcohol, but it was necessary to prove that what the appellant had supplied was beer.
- (ii) the magistrate was not entitled to rely on s. 28 (*d*) of the Liquor Ordinance, since that provision is expressed to apply to “a closed bottle or container”.
- (iii) the evidence of the police witnesses did not amount to more than that they saw a liquid being poured from open bottles labelled beer (with the brand name), and in view of the provisions of s. 28 (*d*) of the Liquor Ordinance, the court could not draw any inference from the labels on open bottles as distinct from labels on “closed” bottles.

Appeal allowed. Conviction quashed. Sentence set aside.

No cases referred to in judgment

Judgment

The following judgment of **Sir Audley McKisack**: was read by **Sheridan J**:

The appellant, who owns a bar, was convicted of contravening s. 16 (1) (a) of the Liquor Ordinance, 1960. The particulars of the offence as laid in the charge are that at about 12.15 a.m. on December 24, 1960, he supplied intoxicating liquor outside the permitted hours. It is not disputed that his licence permits him to sell or supply intoxicating liquor up to 10 p.m. only.

At the trial he denied that anything was sold at his bar after 10 p.m.

There was evidence by two police officers that at 12.15 a.m. at the appellant's bar they saw people being supplied with a liquid, referred to by the witnesses as "beer", poured out of bottles labelled "Nile Beer" (and the names of other brands of beer).

In the course of his judgment the learned magistrate says that:

"About thirteen people were in the bar drinking beer from bottles bearing the labels Bell, Tusker and Nile. P. C. Manywera said he saw the accused receive money from people and give them beer. I believe this . . .

"Mr. Pandit has argued that there is no evidence to show that the liquor comes within the Ordinance. I rely on s. 28 (d) of the Liquor Ordinance and find that the bottles marked Nile, Bell and Tusker contained those brands of beer. Courts are entitled to take note of notorious facts and I regard it as a completely notorious fact that the European type beer in this country contains more than 2 per cent. alcohol."

Mr. Fuad for the Crown concedes that the learned magistrate was not in fact entitled to take judicial notice of this so-called "completely notorious fact", but he further says that the question of the percentage of alcohol is irrelevant.

The offence relates to the supply of "intoxicating liquor", and this expression is defined in s. 2 of the Ordinance as meaning "liquor or native liquor". In the instant case we are not concerned with native liquor. The term "liquor" is defined in the same section as follows:

" 'liquor' means spirits, wine, ale, beer, porter, cider, perry, hop beer or any drink containing more than two per centum by weight of absolute alcohol, but does not include native liquor."

Mr. Pandit for the appellant argues that in this definition the reference to two per centum by weight of absolute alcohol applies to all the named drinks (spirits, wine, etc.); otherwise such things as ginger ale or ginger beer would come within the definition of "liquor" and consequently of "intoxicating liquor". I think, however, that this construction is contrary to the grammatical sense of the definition. To support Mr. Pandit's construction the expression "or any drink" should have been "or any other drink", and his argument about ginger ale is answered quite simply by the fact that it is "ale" and not "ginger ale" which is referred to in the definition. They are two quite different things (save that both are liquids), as everybody knows—just as meat is a very different thing from a sweetmeat. Of the named drinks in the definition of liquor the only one which is itself defined in the Ordinance is spirits. Consequently the other named drinks bear their ordinary meaning and have no special statutory meaning. The definition of beer in the Shorter Oxford Dictionary is:

"an alcoholic liquor obtained by the fermentation of malt (or other saccharine substance), flavoured with hops

or other bitters”.

The amount of the alcoholic content is not specified by the Ordinance, and it was not necessary for the prosecution to prove that the “beer” of which the

witnesses spoke contained more than two per centum by weight of absolute alcohol.

But it was, of course, necessary for the prosecution to prove that what the appellant supplied was beer. It will be seen from the passage I have cited from the magistrate's judgment that he relied for this purpose on s. 28 (d) of the Ordinance, which is as follows:

"In any proceedings relating to an offence under the provisions of this Ordinance—

.....

- (d) evidence that a closed bottle or other container bears a label or other marking which indicates that it contains any kind of intoxicating liquor shall be *prima facie* evidence that it contains the kind of intoxicating liquor indicated."

Mr. Pandit argues that this provision means that the label must indicate that the contents contain more than two per centum by weight of absolute alcohol. But this contention fails for the reason I have already given in relation to the definition of "liquor".

Nevertheless the learned magistrate was not, in my view, entitled to rely on s. 28 (d), since that provision is expressed to apply to "a closed bottle or container". I can find nothing in the evidence relating to closed bottles. Such evidence as there was on this point was to the contrary. One of the two police witnesses, Constable Obaw, said of the barmaid who was serving drinks:

"I saw a woman passing beer to buyers. She was behind the counter. She was passing open bottles."

The other police witness did not say whether the bottles were open or closed.

Mr. Fuad argues that it was unnecessary for the magistrate to rely on s. 28 (d); that there was ample evidence that the drinks were beer; and that this court, as a first appellate court having the duty to re-assess the evidence given in the court below, should not upset the conviction if satisfied that the evidence of the two prosecution witnesses proves that the drinks in question were beer. And he points out that there was no evidence to the contrary by the defence.

The evidence of the police witnesses does not, I think, amount to more than saying that they saw a liquid being poured from open bottles labelled beer (with the brand name). No doubt it looked to them like beer, though they do not say so in so many words. In view of s. 28 (d) of the Ordinance, I do not think a court can draw any inference from the labels on open bottles, as distinct from labels on "closed" bottles. We are left, therefore, with the inference that what the policemen saw looked to them like beer. So far as we know, they relied solely on their sense of sight and did not, for example, also call in aid their sense of sight and did not, for example, also call in aid their sense of smell or taste, which (if they were men of experience in this field) might have strengthened the value of their evidence. But, since there is nothing beyond the inference that the liquid looked like beer to two policemen who did not even claim to be knowledgeable on the subject, I do not think it can possibly be said that the prosecution has proved beyond reasonable doubt that the liquid supplied by the appellant was beer.

Consequently the appeal succeeds. The conviction is quashed. The fine to which the appellant was sentenced must, if already paid, be refunded, and the order cancelling his licence is set aside.

Appeal allowed. Conviction quashed. Sentence set aside.

For the appellant:

SV Pandit

For the respondent:
KT Fuad (Crown Counsel, Uganda)

BA Shah v The Commissioner of Income Tax
[1961] 1 EA 279 (HCU)

Division: HM High Court of Uganda at Kampala
Date of judgment: 16 May 1961
Case Number: 12/1960
Before: Sir Audley McKisack CJ

[1] Income tax – Allowance – Child and education allowance – Meaning of word “child” – East African Income Tax (Management) Act, 1958, s. 52 and s. 53 – English Income Tax Act, 1952, s. 212.

Editor’s Summary

The appellant’s father having died, the appellant assumed responsibility for the maintenance and education of his brother and sister, aged twenty-three and twenty-one years respectively, and claimed the “child allowance” allowed by s. 52 of the East African Income Tax (Management) Act, 1958, and the “education allowance” under s. 53 of the Act. The claim was disallowed. On appeal it was submitted that the word “child” in s. 52 should be construed as any young person for whom the taxpayer is morally and financially responsible; and that s. 52 (2) has not the effect of restricting the term “child” to any particular relationship with the taxpayer.

Held – the term “child” in s. 52 does not import age but relationship and cannot be construed as including the quite different relationship of brother and sister; accordingly its application cannot be extended to that relationship.

Appeal dismissed.

No cases referred to in judgment

Judgment

Sir Audley McKisack CJ: This is an appeal from a decision of the local committee for income tax affirming an assessment by the Commissioner of Income Tax.

The appellant claimed the “child allowance” provided for in s. 52 of the East African Income Tax (Management) Act, 1958, and the “education allowance” under s. 53 of that Act. Both claims were disallowed in his assessment.

The agreed facts are that, the appellant’s father having died, the appellant assumed responsibility for the maintenance and education of the appellant’s brother aged twenty-three years, who is at an English

university, and his sister aged twenty-one years, who is at a school of art in India. The appellant is paying the fees for his brother and sister at these institutions.

The appeal turns on the meaning of the word “child” in s. 52 of the East African Income Tax (Management) Act, 1958, which is as follows:

- “(1) A resident individual who proves that in any year of income he maintained any child who was under the age of sixteen years at any time within such year of income or who, if not under the age of sixteen years at any such time, was receiving full-time instruction at any university, college, school or other educational establishment, or was serving under

articles or indentures with a view to qualifying in a trade or profession, shall, subject to s. 49, be entitled:

- (a) in respect of one such child, to a personal allowance, in this Act referred to as the primary child allowance; and
- (b) in respect of each additional such child not exceeding three in number, to a personal allowance, in this Act referred to as the secondary child allowance.

“(2) In this section the expression ‘child’ includes a stepchild, an adopted child and an illegitimate child.”

Mr. Clerk for the appellant maintains that the word “child” is here to be construed as meaning any young person for whom the taxpayer is—as in this case—morally and financially responsible. He says that sub-s. (2) of s. 52 does not have the effect of restricting the term to any particular relationship with the taxpayer; and that it is superfluous and has merely been inserted for historical reasons connected with the progressive widening of the scope of the term in English statutes; and that the definition in any event is not exhaustive.

But I cannot dismiss a sub-section in an Act as a mere superfluity without very good reason. And I do not think that the term “child” in the section imports age rather than relationship. Clearly it cannot of itself import any precise limitation of age, since the section is so worded as to refer first to those under sixteen years and then, without any reference to age, to those at educational establishments. It is true that the definition in sub-s. (2) is not exhaustive, since it uses the term “includes” and not the term “means”, such a definition clearly could not be exhaustive unless it referred in terms to a legitimate child of the taxpayer as well as to a stepchild, an adopted child and an illegitimate child.

But that is not a sufficient reason for saying that the word “child” can be construed as also including the quite different relationship of brother or sister.

I do not think that any assistance for Mr. Clerk’s argument is to be gained from a comparison with s. 212 of the English Income Tax Act of 1952, to which he has referred me. The relevant portions of that section are as follows:

“(1) If the claimant proves that he has living at any time within the year of assessment any child who is either under the age of sixteen years or who, if over the age of sixteen years at the commencement of that year, is receiving full-time instruction at any university, college, school or other educational establishment, he shall, subject to the provisions of this and the next following section, be entitled in respect of each such child to a deduction from the amount of income tax with which he is chargeable equal to tax at the standard rate on the appropriate amount for the child.

“In this provision, ‘child’ includes a stepchild and an illegitimate child whose parents have married each other after his birth.

“(2) If the claimant proves that for the year of assessment he has the custody of and maintains at his own expense any child who is under the age of sixteen years at the commencement of that year, or who, if over the age of sixteen years at the commencement of that year, is receiving such full-time instruction as aforesaid and that neither he nor any other individual is entitled to relief in respect of the same child under the preceding provisions of this section or under any of the other provisions of this part of this Act, or, if any other individual is entitled to such relief, that that other individual has relinquished his claim thereto, he shall be entitled in respect of the child to the same relief as if the child were a child of his.”

It seems clear that, whereas the term child in sub-s. (1) of this section imports the relationships therein referred to and not age, sub-s. (2) is wider and refers to a “child” who is not the child of the taxpayer but

is one of whom he has the custody and whom he maintains at his own expense.

In Simon's Income Tax (2nd Edn.), at p. 144 the learned editor, commenting on s. 212, says:

"It is to be noted that the word 'child' in this section imports relationship to the parent, not limit of age (e.g. it does not exclude children over twenty-one years of age) . .

"Section 212 (1) of [the Act] states that the expression 'child' includes a stepchild, or an illegitimate child provided that the parents have married after the birth of the illegitimate child. The relief is extended by s. 212 (2) which grants relief where the claimant has the custody and expense of maintaining any child. This will include an adopted child or an illegitimate child (where the parents have not subsequently married) or a younger brother or sister."

It will be seen that s. 52 of the East African Act is quite different from s. 212 of the English Act. The draftsman of the former is content with one sub-section similar to the first paragraph of sub-s. (1) of the English section, together with a sub-section extending the meaning of 'child' to stepchild, adopted child and illegitimate child (whether or not the parents have subsequently married). And there is nothing in the East African section about an individual who "has the custody of" a child, nor any reference to his being entitled "to the same relief as if the child were a child of his".

I have no hesitation, therefore, in holding that s. 52 of the East African Act cannot bear the meaning ascribed to it by the appellant and its application does not extend to brother or sister. Consequently this appeal must be dismissed with costs, and the assessment is confirmed.

Appeal dismissed.

For the appellant:

AV Clerk

For the respondent:

JM Gilmartin (Assistant Legal Secretary, East Africa High Commission)

For the appellant:

Advocates: *Mayanja, Clerk & Co*, Kampala

For the respondent:

The Legal Secretary, East Africa High Commission

DD Bawa Limited v GS Didar Singh
[1961] 1 EA 282 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	15 June 1961
Case Number:	1077/1960
Before:	Sir Audley McKisack CJ

[1] *Practice – Sale of goods – Cause of action – Claim for goods sold and delivered – Whether necessary to aver in plaint that prices were agreed or are reasonable.*

[2] *Pleading – Amendment – Whether oral application can be made during hearing – Civil Procedure Rules, O. 6, r. 18 and r. 30 and O. 48, r. 1 (U.) – Civil Procedure Ordinance (Cap. 6), s. 103 (U.).*

Editor's Summary

The plaintiff claimed Shs. 25,122/85 for goods sold and delivered to the defendants and annexed to the plaint a statement of account. The defence contended *inter alia* that the plaint was bad in law as the plaintiff had failed to aver that the prices for the goods sold and delivered were agreed prices or were reasonable prices. At the trial it was contended for the defendant that if the plaintiff wished to amend his pleading, he could not do so by an oral application at the trial but in view of O. 6, r. 30 of the Civil Procedure Rules should do so by a chamber summons.

Held –

- (i) the plaint with the particulars annexed thereto disclosed a cause of action and there was no purpose in the plaint being amended to aver that the prices were agreed or were reasonable as this was necessarily implied: *Amin Electrical Services v. Ashok Theatres Ltd.*, [1960] E.A. 298 (U.) and *Lake Motors Ltd. v. Overseas Motors Transport (T) Ltd.*, [1959] E.A. 603 (T.) considered.
- (ii) the purpose of O. 6, r. 30 was not to preclude the court from dealing with an oral application to amend pleadings in the course of a hearing, but to provide that, if an interlocutory application is made under O. 6, r. 18, it should be by summons in chambers and not by notice of motion; otherwise the words “at any stage of the proceedings” in r. 18 would hardly be consistent with r. 30.
- (iii) the interpretation of r. 30 for which the defendant contended is inconsistent with s. 103 of the Civil Procedure Ordinance which provides for amendment at any time in any proceeding in a suit.

Judgment for the plaintiff.

Cases referred to:

- (1) *Amin Electrical Services v. Ashok Theatres Ltd.*, [1960] E.A. 298 (U.).
- (2) *Lake Motors Ltd. v. Overseas Motor Transport (T) Ltd.*, [1959] E.A. 603 (T.).

Judgment

Sir Audley McKisack CJ: after disposing of the first issue raised by the defence continued: The other line of defence is that the plaint is bad in law for failure to aver that the prices for the goods sold to the defendant were agreed prices or were reasonable prices. This question has already been the subject of a decision in the Uganda High Court. Sheridan, J., in *Amin Electrical Services v. Ashok Theatres Ltd.* (1), [1960] E.A. 298 (U.)

held that the failure to allege that goods were supplied at agreed or reasonable prices was a defect in pleading which, however, did not go to the root of the cause of action and was curable by amendment. Sheridan, J., was here following a decision of the High Court of Tanganyika in *Lake Motors Ltd. v. Overseas Motor Transport (T) Ltd.* (2), [1959] E.A. 603 (T.). In that case Law, J., in the course of his judgment, said:

“The plaint is on the face of it defective for want of an allegation that the sum sued for represents the agreed or reasonable price of the goods allegedly delivered and the services allegedly rendered. In this respect the plaint does not comply with the requirements of r. 2 and r. 3 of O. 6 of the Code of Civil Procedure. Is it, however, so defective as to disclose no cause of action, so as to necessitate rejection under O. 7, r. 11 (a)? This depends on whether or not it can be properly inferred from the plaint that an agreed or reasonable price was claimed.”

Law, J., came to the conclusion that such an inference could properly be drawn in that case, and that it could not be said that the plaint failed to disclose a cause of action. Sheridan, J., came to the same conclusion in the *Amin Electrical Services* case (1).

In the instant case, in which the statement of account annexed to the plaint shows numerous sales to the defendant between August, 1958, and August, 1960, together with numerous sums credited to the defendant during that period, I have no hesitation in saying that it is proper to draw the inference that the goods are alleged to have been supplied at prices which were either agreed or were reasonable. But, if I follow the decision in the *Amin Electrical Services* case (1), in its entirety I must hold not only that the plaint discloses a cause of action, but also that there is a defect of pleading, which has to be cured by amendment.

But Mr. Singh, for the plaintiff, contends that there is not even a defect of pleading. He points out that in England an averment that the prices are reasonable or agreed is not essential, as shown by the precedent in the Annual Practice, 1960, at p. 2286. The Tanganyika Civil Procedure Rules contain precedents of pleadings, the use of which is made mandatory by O. 6, r. 3, of those rules; and the precedent for a suit for goods sold and delivered does include the averment that the goods were sold at a fixed price or a reasonable price. The Uganda rules, however, contain no precedents for pleadings, and consequently there is nothing in the Uganda rules, in contrast to the Tanganyika rules, which makes this averment necessary.

In the *Lake Motors* case (2), I doubt if Law, J., would have deemed an amendment of the plaint necessary—seeing that he found the omitted averment could properly be inferred—if it had not been for the mandatory provision in the Tanganyika rules relating to precedents for plaints. In Uganda, where we have no such provision, I see no purpose in the plaint being amended where the missing averment is necessarily implied—as it is in the instant case.

The question of the necessity or otherwise of amending the plaint would, in the instant case where no evidence is to be called, be merely academic were it not for a point raised by Mr. Dalal as to the procedure by which a plaint can be amended at the hearing of a suit. He points out that, although O. 6, r. 18, of our Civil Procedure Rules provides the court with power to allow amendments of pleadings, r. 30 of that Order requires that applications under certain rules, including r. 18, shall be by summons in chambers. He submits that I could not allow an amendment to be made in the course of the hearing, and that it would be necessary for the hearing to be adjourned in order that an application might be made by the plaintiff by summons in chambers for leave to amend his plaint. If this view of the law is correct, it produces a highly inconvenient result attended with unnecessary delay. But I am satisfied it is

not a correct view. Order 48 of the Civil Procedure Rules deals with motions and other applications, and r. 1 is as follows:

“All applications to the court, save where otherwise expressly provided for under these rules, shall be by motion and shall be heard in open court.”

Rule 30 of O. 6 is clearly one of the exceptions to this general provision. I think its purpose is not to preclude the court from dealing with an oral application to amend pleadings in the course of a hearing, but to provide that, if an interlocutory application is made under O. 6, r. 18, it shall be by the procedure of summons in chambers and not by notice of motion. Otherwise the words “at any stage of the proceedings” in r. 18 would hardly be consistent with r. 30. And there is the further point made by Mr. Singh—which I think is a good point—that the interpretation contended for by Mr. Dalal would be inconsistent with s. 103 of the Civil Procedure Ordinance itself, and it is not within the power of the rule-making authority to make rules inconsistent with the provisions of the Ordinance (see s. 85 (1)). Section 103 is as follows:

“103. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.”

I do not doubt, therefore, that in a proper case the court can allow a pleading to be amended during the trial on an oral application.

As I said at the beginning of this judgment, the parties have agreed that the case be disposed of on the two lines of defence with which I have dealt, and there will accordingly be judgment for the plaintiff for the amount claimed—Shs. 25,122/85- with costs.

Judgment for the plaintiff.

For the plaintiff:

Gurdial Singh

For the defendant:

SH Dalal

For the plaintiff:

Advocates: *Singh & Treon*, Kampala

For the defendant:

Haque, Dalal & Singh, Kampala

Guaranty Discount Company Ltd v Oliver Lawrence Ward
[1961] 1 EA 285 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 23 May 1961

Case Number: 10/1960
Before: Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA
Appeal from: H.M. Supreme Court of Kenya—Miles, J

[1] Pleading – Hire-purchase agreement – Default – Possession of goods resumed – Claim for “agreed depreciation” under clause in agreement – Clause held to be a penalty – Whether court can award reasonable compensation – Whether pleadings require amendment to include claim for reasonable compensation – Indian Contract Act, 1872, s. 74.

Editor’s Summary

The respondent had entered into a hire-purchase agreement for a car but after paying the initial instalment he defaulted. The appellant company terminated the hiring, re-possessed the car and brought an action for, *inter alia*, Shs. 7,081/- as “agreed depreciation” under cl. 11 of the hire-purchase agreement, which read as follows: “In the event of . . . the owner retaking possession of the goods . . . the hirer shall be liable to pay the owners. . . (c) By way of agreed depreciation of the goods the difference between three-quarters of the total hire-purchase price payable under this agreement and the total of the sums already paid.”

The respondent admitted the rest of the claim but contended that cl. 11 was a penalty clause and not one providing for liquidated damages. This was the only issue framed at the hearing, but later counsel for the appellant company submitted that even if it were a penalty clause, under s. 74 of the Indian Contract Act the court must award compensation and said he would call evidence. The trial judge dismissed the claim for liquidated damages under cl. 11 holding that as counsel for the appellant company had earlier agreed that the only issue was whether the clause provided for a penalty or not he could not in the absence of any amendment to the pleadings entertain a claim for actual damage sustained. On appeal

Held –

- (i) under s. 74 *ibid*, if a contract is broken, where a sum is expressed to be payable on such breach, whether it would be deemed liquidated damages or penalty, the result which follows is the same: in either case the court will award reasonable compensation not exceeding the amount named.
- (ii) when an action is brought to recover the sum named in a contract as liquidated damages, no further nicety of pleading is required to enable the court to give effect to s. 74 *ibid*, all questions arising thereunder flow as a matter of law from the claim.
- (iii) the trial judge (who could have reframed the issues if necessary) should have heard the evidence which it was proposed to tender and assessed reasonable compensation, if any, under s. 74.
- (iv) as counsel for the appellant company had consented to the framing of a single issue, which covered only a part of what the trial judge had to determine, there would be no order for costs of the appeal.

Appeal allowed. Case remitted to the Supreme Court to determine after hearing any evidence tendered whether the appellant company was entitled to any compensation.

Cases referred to:

- (1) *Lamdon Trust Ltd. v. Hurrell*, [1955] 1 W.L.R. 391.
- (2) *Wallis v. Smith* (1882), 21 Ch. D. 243.
- (3) *Public Works Commissioner v. Hills*, [1906] A.C. 368.
- (4) *Bhai Panna Singh v. Bhai Arjun Singh* (1929), A.I.R. P.C. 179.
- (5) *Sundar Koer v. Sham Krishen* (1906), 34 I.A. 9.
- (6) *Credit Finance Corporation Ltd. v. Harcharan Singh Ranautta*, [1961] E.A. 231 (C.A.).

May 23. The following judgments were read:

Judgment

Gould JA: This is an appeal from a judgment of the Supreme Court of Kenya at Nairobi. The appellant company was plaintiff in an action against the respondent, brought in respect of a hire-purchase agreement dated October 8, 1958, between the appellant company as owner and the respondent as hirer of a Renault Dauphine motor car. Under the agreement the respondent paid an initial instalment of Shs. 3,000/- and agreed to pay a further seventeen monthly instalments of Shs. 580/- each. He made default in payment of the first two of such instalments and the appellant company then terminated the hiring and retook possession of the car. The hire-purchase agreement was of the usual type and included an option to the respondent to determine the hiring by returning the motor car to the appellant company in good condition and repair.

The claims in the plaint for the two unpaid instalments, hire rental for a broken period up to the date of seizure and expenses of seizure, were admitted. The subject matter of the contest in the court below was a claim for Shs. 7,081/- for “agreed depreciation” under cl. 11 (c) of the agreement which reads as follows:

- “(11) In the event of the hirer returning the goods under cl. 10 above or in the event of the owner retaking possession of the goods under cl. 7 above, the hirer shall be liable to pay the owners:
 - (c) By way of agreed depreciation of the goods, the difference between three-quarters of the total hire-purchase price payable under this agreement and the total of the sums already paid.”

In his judgment the learned judge said that the only defence raised at the hearing was that cl. 11 amounted to a provision for a penalty and not liquidated damages. Basing himself upon the decision in *Lamdon Trust Ltd. v. Hurrell* (1), [1955] 1 W.L.R. 391, the learned judge considered that it was clear that in so far as the case was governed by English law cl. 11 would amount to a penalty clause.

In the course of the argument before the learned judge counsel for the plaintiff (appellant company) relied upon s. 74 of the Indian Contract Act, which is applicable in the present case, and which reads:

- “74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

Counsel submitted that under this section, even if the clause in question was a penalty clause, the court must award compensation. He stated that he would

call evidence. The judgment on this part of the case is the subject of the appeal to this court. Having quoted s. 74 (supra) the learned judge continued:

“This section does not do away with the distinction in the English cases between liquidated damages and a penalty but, as the learned authors of Pollock and Mulla in their commentaries to the section (3rd Edn.), p. 480, state:

‘This section boldly cuts the most troublesome knot in the common law doctrine of damages’.

“Mr. Patel, at the close of his argument on the construction of this clause, stated that he would bring evidence to show the price at which the vehicle was resold. To this Mr. Winayak objected, pointing out that this was, in fact, putting forward a new cause of action which had not been pleaded.

“I must confess that I was surprised to hear Mr. Patel’s statement in view of the fact that he had, at an earlier stage in the proceedings, agreed that the only issue was whether the clause in question was a penalty. Mr. Patel has drawn attention to a paragraph in the same volume of Halsbury’s Laws of England at p. 301:

‘Where the sum stipulated is a penalty, the result of suing for the penalty is that the plaintiff recovers the damages proved but only up to the penal sum fixed’.

“The authority cited from this is a passage in the case of *Law v. Local Board of Redditch*, (1892) 1 Q.B. at p. 133; this is presumably the passage in the judgment of Kay, L.J.:

‘In early times it was decided by Courts of Equity that where the sum of money was agreed to be paid as a penalty for the non-performance of a collateral contract, equity would not allow the whole sum to be recovered; but where the damages for non-performance of such contract could be estimated, would cut down the penalty to the amount of the actual damages sustained.’

“It does not seem to me that this passage is of sufficient authority to justify the court entertaining a claim on a different basis from that which has been pleaded. Mr. Patel is now putting forward a case which the defendant is clearly not in a position to meet and of which he has had no notice. Order VII, r. 1, provides that the plaint shall contain the following particulars. (E) The facts constituting the cause of action and when it arose. In the absence of an amendment, which has not been asked for and which I doubt whether I would have granted, a claim for the actual damage sustained cannot be entertained. The result of my construction of cl. 11 (c) is that the claim for Shs. 7,081/- fails.”

The point at issue is essentially one of pleading. Paragraph 6 of the plaint reads:

“6. It was further provided in the said agreement that in the event of the plaintiff retaking possession of the vehicle as aforesaid, the defendant shall be liable to pay to the plaintiff by way of agreed depreciation of the vehicle, the difference between three-quarters of the total hire-purchase price payable under the said agreement (i.e. Shs. 13, 442/-) and the total of the sums already paid.”

The corresponding prayer is:

“Shs. 7,081/-, agreed depreciation of the vehicle in terms of para. 6 hereof”.

Paragraph 5 of the written statement of defence is as follows:

- “5. Without prejudice to the foregoing the defendant denies that the plaintiff is entitled to claim the sum of Shs. 8,477/- under the hire-purchase agreement dated the 8th day of October, 1958, and the defendant contends that the plaintiff is only entitled to claim the damage which the plaintiff might have suffered, which is denied, after re-sale of car registration No. KGA 433 as at the 8th day of November, 1958, or at the 8th day of December, 1958, as opposed to the claim set out in para. 8 of the plaint.”

The learned judge has found that this is an insufficient base for a claim for “the actual damage sustained”; there may be little point in the distinction, but s. 74 of the Indian Contract Act, which sets out the law which the learned judge was to apply, speaks not of damages but of “reasonable compensation”. Under English law, as can be seen from the passage from Halsbury’s Laws of England quoted by the learned judge, the result of suing for penalty is that the plaintiff recovers the damages proved, up to the amount of the penal sum. His suit is for the sum payable under the agreement, and the question is whether it is essential that he include in his pleading an alternative claim for the damages proved. That, no doubt, would be an idea from of pleading and it was adopted in *Wallis v. Smith* (2) (1882), 21 Ch. D. 243, in which the plaintiff sued for liquidated damages, adding a claim “in the event of the court deciding that the sum named was a penalty”, for such damages as he might be found entitled to.

On the other hand, in *Public Works Commissioner v. Hills* (3), [1906] A.C. 368, their Lordships of the Privy Council, having held that certain sums of money were penalties, expressed themselves as follows, at p. 376:

“Their Lordships are not, however, satisfied that the Government has been given a proper opportunity to prove such damages, not exceeding the sums in the penalties, as they can make out. In the court below the whole contention seems to have turned upon the question of liquidated damages, yea or nay. The judgment of the learned Chief Justice which decides—as their Lordships think, rightly—that the damages are not liquidated, does not directly deal with the question of damages, unless certain remarks are held to lay down the proposition that in such a contract the Government, as a Government, could suffer no damage. Their Lordships do not take that view.

.....

It seems to their Lordships that there are obvious elements of damage in such a position, and that the Government should be given the opportunity of proving such damage and evaluating it in money.”

This appears to have reference to a situation very much akin to the one at present before this court, and though the pleadings in *Public Works Commissioner v. Hills* (3) are not set out in the report, counsel for the respondent Hills is quoted as saying in argument that there was neither allegation nor proof of any damage. In spite of that the Privy Council ruled that the Commissioner was entitled to prove his damage and have judgment accordingly.

This case appears to support what I understand to be the law in England; that is, when a plaintiff sues, after breach of a contract, upon such a clause as cl. 11, he is suing for agreed or liquidated damages. The court will determine whether the sum sued for is in fact a pre-estimate of damages or a penalty. If the former judgment will be given for that amount; if the latter, judgment will be given, not for the liquidated amount claimed but for an amount representing what has been proved. His suit is for pre-estimated damages, but if the court holds that the amount named is not a genuine pre-estimate, it is not

precluded from giving judgment for the actual damage up to the amount claimed.

Under s. 74 of the Indian Contract Act the position seems to be quite clear. If the contract is broken, where there is a sum expressed in the contract to be payable on such breach, whether it would be deemed either liquidated damages or penalty, the result which follows is the same; in either case the court will award reasonable compensation not exceeding the amount named. In the judgment of the Privy Council in *Bhai Panna Singh v. Bhai Arjun Singh* (4) (1929), A.I.R. P.C. 179 at p. 180 is the following passage:

“The effect of s. 74, Contract Act of 1872, is to disentitle the plaintiffs to recover simpliciter the sum of Rs. 10,000 whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.”

I read that as meaning that though the plaintiffs sue to recover the sum named, they may obtain judgment for only the damage proved. The passage of course does not purport to deal fully with s. 74, which contains the words, “whether or not actual damage or loss is proved to have been caused thereby”. I think that when action is brought to recover the sum named no further nicety of pleading is required to enable the court to give effect to the section, all questions arising thereunder flowing as a matter of law from the claim. The case of an action on a covenant for interest may be taken as an example. If the sum claimed is found to be a penal sum the plaintiff is not barred from recovering at a lower rate. Such a position arose in *Sundar Koer v. Sham Krishen* (5) (1906), 34 I.A. 9, in which their Lordships of the Privy Council said, at p. 18:

“The principal appellant (the mortgagor) argues that the increased interest ought therefore to be disallowed altogether. But this is not what the statute prescribes. It directs that the party complaining of the breach shall receive from the party who has broken the contract reasonable compensation, not exceeding the amount of the penalty stipulated for.”

In the present case I should add that para. 5 of the written statement of defence, at the very least, indicates that the respondent would not have been taken by surprise had the learned judge entertained the application to call evidence on the question of actual damage.

Counsel for the respondent submitted that the decision of this court in *Credit Finance Corporation Ltd. v. Harcharan Singh Ranautta* (6), [1961] E.A. 231 (C.A.), was a precedent which ought to induce the court to disallow the appeal. That case was also one concerning a hire-purchase agreement but it is clearly distinguishable in that, though the agreement contained a clause resembling cl. 11 in the agreement in the present case, it was not sued upon and counsel expressly disclaimed any intention of relying upon it. The issues raised under s. 74 of the Indian Contract Act by such a suit as this were therefore never discussed. There is, however, another aspect of that case which is closer to the facts of the present one. The submission of counsel for the plaintiff was that his action was one for damages arising out of the breach of the hire-purchase agreement. Evidence was led showing the price at which the plaintiff had disposed of the vehicle after re-possessing it and he claimed the total price payable under the agreement (with interest and expenses) less the amount received upon re-sale. This court held that, assuming that the action as framed was a claim for damages, they had been claimed upon a wrong basis—the basis of a sale of goods on credit. The learned judge could not give judgment for the plaintiff on that basis and had no material before him to enable him to give judgment for damages on any other basis. In the present case the evidence which counsel for the appellant company said that he wished to lead, concerned the re-sale price of the vehicle. That would result in the learned

judge being in much the same position, so far as evidence is concerned, as was the learned judge in *Credit Finance Corporation Ltd. v. Harcharan Singh Ranautta* (6) and counsel for the respondent submitted that it would not have assisted the appellant company had it been permitted to call the evidence. I think there is a two-fold answer to this submission, attractive though it appears. In the first place, the present action is one in which (if the opinion I have expressed earlier is correct) the learned judge had to decide whether he would award “reasonable compensation” under s. 74 “whether or not actual damage or loss is proved”, a position which never arose in the *Credit Finance Corporation* case (6). It appears possible that the evidence of re-sale price might have assisted him in that particular task. Secondly, I think that, though only the re-sale price was mentioned, the appellant company should have been at liberty to adduce any other evidence which may have been in its possession bearing on the subject of reasonable compensation for undue depreciation.

For the foregoing reasons I think that the learned judge (who could have reframed the issues if necessary) should have heard the evidence which it was proposed to tender and assessed reasonable compensation, if any, under s. 74. There has been no appeal to this court against the finding of the learned judge that the sum mentioned in cl. 11 is a penalty, and on my reading of s. 74 that is a matter which would appear only to be material when reasonable compensation is being considered.

I would allow the appeal, set aside the judgment so far as it relates to the claim for Shs. 7,081/- and remit to the Supreme Court an issue whether the appellant company is entitled to any award of reasonable compensation arising out of that claim (and if so, how much) after hearing such evidence as the appellant company (and the respondent if he desires) may tender thereon. The existing decree for the sum of Shs. 1,396/- should remain, but the award of costs thereon on the subordinate court scale should be deleted, and the whole question of the costs in the Supreme Court be in the discretion of the judge who determines the issue which I propose should be remitted.

I do not think that the appellant company should be entitled to any costs of this appeal. By its counsel it consented to the framing of a single issue, which covered only a part of what the learned judge had to determine. The case was therefore opened by counsel for the respondent and the suggestion concerning the evidence came for the first time when counsel for the appellant company was replying. Had counsel insisted at the outset that the issues be framed to cover what he was then submitting, the hearing might well have taken a different course and this appeal been rendered unnecessary. I would order that there be no costs of the appeal.

Sir Kenneth O’Connor P: I agree. There will be an order as proposed by the learned Justice of Appeal.

Sir Alastair Forbes VP: I also agree.

Appeal allowed. Case remitted to the Supreme Court to determine after hearing any evidence tendered whether the appellant company was entitled to any compensation.

For the appellant company:

NM Patel

For the respondent:

Bryan O’Donovan QC and JK Winayak

For the appellant company:

Advocates: *RD Patel*, Nairobi

For the respondent:

Winayak, Johar & Co, Nairobi

Kampala Aerated Water Co Ltd v Gulbanu Rajabali Kassam
[1961] 1 EA 291 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 23 May 1961
Case Number: 103/1960
Before: Sir Alastair Forbes V-P, Gould JA and Sir Owen Corrie Ag JA
Appeal from: H.M. High Court of Uganda–Lyon, J

[1] *Fatal accident – Damages – Method of assessment – Deductions from damages – Whether deduction must be made for value of estate of deceased – Value of dependencies – Apportionment of damages – Law Reform (Miscellaneous Provisions) Ordinance, 1953, Parts II and III (U.) – Fatal Accidents Act, 1846.*

[2] *Damages – Assessment – Fatal accident – Value of dependencies – Deductions – Law Reform (Miscellaneous Provisions) Ordinance, 1953, Parts II and III (U.) – Fatal Accidents Act, 1846.*

Editor’s Summary

The respondent was the eldest of eight surviving children of a shopkeeper who, with his wife and another child, was killed when his car collided with a vehicle driven by a servant of the appellant company. The respondent brought an action against the appellant company for damages on her own behalf and, under Part II of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, on behalf of the other surviving children of the deceased. The trial judge held that the appellant company’s driver was negligent and wholly to blame for the collision and awarded Shs. 120,000/-damages which included a comparatively small amount in respect of agreed special damages. The trial judge found that the deceased’s estate was worth Shs. 120,000/-, that his expectation of life was fifteen years and that he would have continued to pay out for the benefit of his children between £10 and £12 per week. The appellant company appealed only on the damages awarded and submitted that no reduction had been made for the benefit receivable by the surviving children from the estate of the deceased and that the dependency of each individual child should have been taken into account. The appellant company also contended that the dependency of two daughters was about to terminate at the time of the accident by reason of their approaching marriages and that there was some evidence that the respondent and two of her brothers were self-supporting for which the judge had made no allowance. Counsel for the respondent submitted that the amount which the family as a whole had lost by the death of the deceased should be established and then that sum should be apportioned.

Held –

- (i) it has been recognised that where a dependant would in any event have received a benefit from the estate later, had the deceased not been killed in an accident, the financial benefit accruing to the dependant is not the full capital value but may have relation to the value of receiving at present what he would later have received—the accelerated value.
- (ii) in the instant case the value of the estate must undoubtedly be considered and a relevant factor in the determination of the net benefit to the surviving children is the expectancy that they would in any event ultimately have received something by way of inheritance.
- (iii) whilst the method urged by counsel for the respondent is usually adopted nevertheless, when the final figure of damages is ascertained by multiplying the annual value of the dependency by a number of years, allowance must be made in fixing that number for the anticipated or possible termination of

the various individual dependencies, and if they will terminate after different intervals some sort of average must be struck; then when the apportionment is made the adjustment between the various dependants can be made.

- (iv) there is ample authority that what must eventually be ascertained is the pecuniary loss of each individual entitled to sue.
- (v) the trial judge did not give adequate, or indeed any, consideration to the question of the duration of the dependencies but appeared to have assumed their continuance in all cases over the full period of the expectancy of working life of the deceased.

Appeal allowed. Damages reduced to Shs. 37,833/- and apportioned between four children found to be dependants.

Cases referred to:

- (1) *Chunibhai J. Patel and Another v. P. F. Hayes and Others*, [1957] E.A. 748 (C.A.).
- (2) *Radhakrishen M. Khemaney v. Mrs. Lachabai Murlidhar*, [1958] E.A. 268 (C.A.).
- (3) *Zinovieff v. British Transport Commission* (1954) (unreported), referred to in Kemp and Kemp on the Quantum of Damages, Vol. 2 at p. 81.
- (4) *Roughead v. Railway Executive* (1949), 65 T.L.R. 435.
- (5) *Grand Trunk Railway Co. of Canada v. Jennings* (1888), 13, App. Cas. 800.
- (6) *Nance v. British Columbia Electric Railway Co. Ltd.*, [1951] A.C. 601; [1951] 2 All E.R. 448.
- (7) *Muirhead v. Railway Executive* (1951 C.A. No. 178—unreported), referred to in Kemp and Kemp on the Quantum of Damages, Vol. 2 at p. 125.
- (8) *Davies v. Powell Duffryn Associated Collieries Ltd.*, [1942] 1 All E.R. 657.
- (9) *Lloyds Bank Ltd. and Mellows v. Railway Executive*, [1952] 1 All E.R. 1248.
- (10) *Mead v. Clarke Chapman & Co. Ltd.*, [1956] 1 W.L.R. 76; [1956] 1 All E.R. 44.
- (11) *Phipps v. Cunard White Star Co. Ltd.*, [1951] 1 T.L.R. 359.
- (12) *May v. Sir Robert McAlpine & Sons (London) Ltd.*, [1938] 3 All E.R. 85.

May 8. The following judgments were read by directions of the court:

Judgment

Gould JA: On the night of August 31, 1959, on the Kampala-Bombo Road there was a violent collision between a motor vehicle driven by a driver employed by one Rajabali Kassam (hereinafter referred to as “the deceased”) and a motor vehicle driven by a servant of the appellant company. The accident resulted in the death of the deceased, his wife Rahematbai Rajabali Kassam and one of his daughters, Dolatkhanu Rajabali. The respondent, who is another daughter of the deceased, suffered some injury. The respondent brought an action for damages in the High Court of Uganda against the appellant company, on her own behalf and, under the provisions of Part II of the Law Reform (Miscellaneous Provisions) Ordinance,

1953 (No. 23 of 1953) on behalf of the other surviving children of the deceased. The learned judge held that the appellant company's driver was negligent and wholly to blame for the collision and awarded damages in the sum of £6,000, which included a comparatively small amount in respect of agreed special damages. There has been no challenge to the learned judge's finding on the question of negligence but the appellant company now appeals to this court against the quantum of damages awarded.

For some years before and up to the date of his death the deceased was the proprietor of a shop at Bamunanika in Uganda. He died intestate and left

an estate, the value of which will be discussed later. Counsel for both parties were agreed that, under the intestacy, the surviving children of the deceased are entitled to the estate in equal shares. Counsel for the respondent also submitted and counsel for the appellant company did not dispute that, in the circumstances of the case, the surviving children, if their father had not been killed in the accident, could have expected to receive some benefit from his estate when he ultimately died—the amount of the benefit is necessarily very speculative. The surviving children, for whose benefit the action was brought, are:

1. The respondent (a daughter), aged twenty-three years.
2. Sadrudin Rajabali Kassam (a son), aged twenty years.
3. Badrudin Rajabali Kassam (a son), aged nineteen years.
4. Zarina Rajabali Kassam (a daughter), aged seventeen years.
5. Shah Sultan Rajabali Kassam (a daughter), aged fifteen years.
6. Amirali Rajabali Kassam (a son), aged twelve years.
7. Roshanali Rajabali Kassam (a son), aged ten years.
8. Nazma Rajabali Kassam (a daughter), aged three years.

The two eldest daughters, viz. the respondent and Zarina, were engaged to be married at the time of the hearing in the High Court, and counsel for the appellant company stated to this court (I understand it to be common ground) that both were in fact married very soon thereafter.

The learned judge's conclusions on the subject of damages were briefly expressed and I will set out in full the relevant passage from his judgment:

"I am not satisfied that the three alleged payments of Shs. 3,900/-, Shs. 2,900/-, and Shs. 2,900/- were or would be made to any of the children in this case. I am, however, satisfied that the deceased father did earn an average of £744 per annum over the five years 1955-1959. He was killed at the end of August, 1959. Some of the children are still carrying on his business, but in Kampala not in Bamunanika. He left an estate of some Shs. 120,000/-. I am quite satisfied that had he not died he would have continued to pay out, for the benefit of his children, something between £10 to £12 per week.

"Making use of the actuarial table to which Mr. Wilkinson referred me on September 28, I propose to award a round figure as damages and a figure which includes the agreed special damage. The figure in that table over a fifteen year period on the basis of £10 per week is £5,400.

"Judgment is therefore entered for the plaintiff for £6,000 with costs and interest as prayed."

It will be observed that the learned judge makes no reference to the receipt by the surviving children of a benefit from the estate of the deceased, a matter which has been the subject of one of the main arguments before this court. The actual award of £6,000 includes £50 agreed damages to the respondent personally for the injury she suffered, £30 funeral expenses and £16 medical expenses: the award of general damages was therefore the sum of £5,904.

The submissions of counsel before this court revealed two basic differences in what they urged as the correct approach to the question of assessment of damages in the present case. The first difference related to the matter of the extent to which the award should be reduced by reason of the benefit receivable or received by the surviving children from the estate of the deceased. The second related to the method to be adopted in assessing the value of the dependencies. I will take these in order.

Counsel for the appellant company argued that the whole value of the estate ought to have been deducted, which would, in his submission, have very substantially

reduced, if not extinguished, the damages altogether. He relied upon a passage in the judgment of O'Connor, C.J. (as he then was), in the Supreme Court of Kenya in *P. F. Hayes v. Chunibhai J. Patel*, [1961] E.A. 129 (K.) quoted in the report of the appeal to this court from that judgment, in *Chunibhai J. Patel and Another v. P. F. Hayes and Others* (1), [1957] E.A. 748 (C.A.) at 749. The passage reads:

“The court should find the age and expectation of working life of the deceased, and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalised by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants.”

In that case this court found that the method of assessment adopted by the learned Chief Justice was correct, and the same passage was applied by this court in the case of *Radhakrishen M. Khemaney v. Mrs. Lachabai Murlidhar* (2), [1958] E.A. 268 (C.A.). Although in *Hayes'* case (1), the capital value of the estate does appear to have been deducted from the damages (the estate was not large) I would not regard the sentence in the passage above quoted,

“A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that”,

as being intended to mean that in every case the full capital value of the estate will be deducted. The phraseology is that of Lord Goddard, C.J., in *Zinovieff v. British Transport Commission* (3) (1954) (unreported), as set out in *The Quantum of Damages* (Vol. 2) by Kemp and Kemp (1956), at pp. 81 and 84, and in that case also it would appear that Lord Goddard, C.J., deducted the full amount of the estate. Nevertheless it has been recognised that where a dependant would in any event have received a benefit from the estate later, had the deceased not been killed in an accident, the financial benefit accruing to the dependant is not the full capital value but may have relation to the value of receiving at present what he would later have received—the accelerated value.

Thus in *Roughead v. Railway Executive* (4) (1949), 65 T.L.R. 435 a deduction was made, by consent of counsel for all parties, in respect of the acceleration of the benefits received from the estate. Humphreys, J., who made the order, did so with some reluctance (following the Privy Council decision in *Grand Trunk Railway Company of Canada v. Jennings* (5) (1888), 13 App. Cas. 800) and would apparently have preferred to make no deduction at all. He said, at pp. 435 and 436:

“In my humble opinion it is a grisly way of looking at things to say that a widow benefits by her husband's premature death because she receives what he proposed to leave her—and in the present case it is everything he had—earlier than she otherwise would have done. Nor am I in the least satisfied that it is a universal rule which could possibly be applied to

all cases. I only say by way of precaution, lest my observation should at any time be repeated by anyone else, that I am very doubtful whether in this case it is right that that sum of money should be deducted; but, fortunately, I have not to consider the matter, because counsel on both sides agreed that I should make that deduction, and I am glad not to have to give any considered judgment on the matter. I merely observe for the consideration of others that it is obviously right to deduct such a sum where what is left to a widow is, for instance, the result of a policy of assurance—say for £1,000. The widow no doubt benefits pecuniarily by receiving from the insurance company her £1,000 to-day instead of getting the same amount—assuming it is a policy without profits—in perhaps ten or twenty years' time.

“Where, however, as in this case, the plaintiff obtains a sum very substantially less than she would have received if the deceased had lived for several years—and everything points to that fact—I think it is extremely doubtful whether it can be said that she benefits pecuniarily by having £5,000 paid to her now as the result of his estate being distributed, instead of £x which she would have received in fifteen or twenty years' time.”

In *Kemp and Kemp* (supra) the opinion is expressed (at p. 11) that each case must be determined upon its particular facts and that the deduction to be made is the amount, if any, by which the dependant has on balance received a benefit from the estate. The text book suggests a number of examples. If an elderly parent received money from his deceased child's estate the full amount should be deducted, for, in the normal course, the parent would have pre-deceased the child and received nothing. On the other hand if the elderly husband of a young wife is killed she might well have received the same amount from her husband's estate, say in five years' time, in which event her net gain would be merely the value of the acceleration of the payment.

Support for this approach is to be derived from what was said by their lordships of the Privy Council in *Nance v. British Columbia Electric Railway Co. Ltd.* (6), [1951] A.C. 601 at p. 615:

“Supposing, by this method, an estimated annual sum of \$y is arrived at as the sum which would have been applied for the benefit of the plaintiff for x more years, the sum to be awarded is not simply \$y multiplied by x, because that sum is a sum spread over a period of years and must be discounted so as to arrive at its equivalent in the form of a lump sum payable at his death as damages. Then a deduction must further be made for the benefit accruing to the widow from the acceleration of her interest in his estate on his death intestate in 1949 (she came into \$6,500, one-third of his estate, x years sooner than she would otherwise have done) and of her interest in sums payable on a policy of \$1,000 on his life; and a further allowance must be made for a possibility which might have been realised if he had not been killed but had embarked on his allotted span of x years, namely, the possibility that the wife might have died before he did. And there is a further possibility to be allowed for—though in most cases it is incapable of evaluation—namely, the possibility that, in the events which have actually happened, the widow might remarry, in circumstances which would improve her financial position.”

In *Muirhead v. Railway Executive* (7) (1951 C.A. No. 178—unreported), as set out in *Kemp and Kemp* (supra) at p. 125 et seq a different approach was adopted. The anticipated income from the shares of the two dependants in the estate was deducted from the annual sums of which the dependants could have expected to have had the benefit from their parent during their dependency. The annual difference was multiplied by ten and the result was diminished on

the score of acceleration (as I understand the judgment) in respect of the period between the end of the estimated dependency and the end of the expectancy of life of the parent. Singleton, L.J., said, at p. 135 of the text book:

“I find great difficulty in knowing how one has to deal with a benefit to a wife or to a child through a portion of the deceased’s man’s estate being received by the wife or child sooner than it otherwise would have been. There is acceleration and that may be a benefit, but it is not always so. I prefer to look upon the matter by saying that it is something which ought to be borne in mind in assessing pecuniary loss.”

In the present case the value of the estate must undoubtedly be taken into consideration and a relevant factor in the determination of the net benefit to the surviving children is the expectancy that they would in any event ultimately have received something by way of inheritance. In the approach to the problem I prefer the guidance to be derived from *Nance v. British Columbia Electric Railway Co. Ltd.* (6), in the particular circumstances, to the method adopted in *Muirhead v. Railway Executive* (7). The approach I propose to adopt approximates what was urged in argument by counsel for the respondent.

I pass now to the second broad difference between counsel. It will be necessary to go into the facts with more particularity later, but for the present it is sufficient to say that counsel for the appellant company urged that the dependency of two daughters was about to terminate at the time of the accident by reason of their approaching marriages and that there was some evidence that the respondent, Sadrudin and Badrudin, were self-supporting. The learned judge made no allowance for this but proceeded on the basis that the deceased would have expended £10–£12 per week on his children during the whole period of fifteen years which the learned judge apparently fixed as his expectancy of working life. The period of expectancy of life was not disputed, and I would accept it. Counsel for the respondent submitted that the principle urged by counsel for the appellant company was wrong. He (counsel for the respondent) contended that a court did not take the case of each dependant and say what each had lost; the question was what the family as a whole had lost by the death of the deceased. Having arrived at that total sum it was then necessary for the court to apportion it.

Undoubtedly the method of calculation urged by counsel for the respondent is usually adopted, and in favour of his argument is the following passage from the judgment of Lord Goddard, C.J., in *Zinovieff v. British Transport Commission* (3), which appears at p. 82 of Kemp and Kemp:

“In these actions, which are brought under the terms of the Fatal Accidents Act, the plaintiffs are the personal representatives, and in assessing the amount that they would be awarded I do not have to consider the different claims of different people; I have to award a lump sum for what I consider those persons who were dependent upon him have lost by his death, and when that sum has been ascertained the court has to proceed, in the absence of agreement, to apportion the amount between the various dependants.”

Nevertheless, I am confident that when this method is adopted and the final figure is ascertained by multiplying the annual value of the dependency by a number of years, allowance must be made in fixing that number for the anticipated or possible termination of the various individual dependencies, and if they will terminate after different intervals some sort of average must be struck; then when the apportionment is made the adjustment between the various dependants can be made. This, I think, underlies what was said by O’Connor, C.J. (in the passage of his judgment above set out) in *Chunibhai J. Patel v. P. F. Hayes* (1), when he said:

“The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children.”

There is ample authority for saying that what must eventually be ascertained in these actions (so far as it is possible to do so) is the pecuniary loss of each individual entitled to sue. In *Davies v. Powell Duffryn Associated Collieries Ltd.* (8), [1942] 1 All E.R. 657 Lord Russell of Killowen said, at p. 658:

“Under those Acts, the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately.”

Lord Wright, at p. 662, said:

“Section 2 of the 1846 Act provides that the action is to be for the benefit of the wife or other member of the family, and the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death. The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages must be considered (*Grand Trunk Railway Co. of Canada v. Jennings*, at p. 804). The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing on the one hand the loss to him of the future pecuniary benefit, and on the other any pecuniary advantage which from whatever source comes to him by reason of the death.”

Lord Porter said, at p. 665:

“Under the Fatal Accidents Act, 1846, the question for decision is what damage is proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit the action is brought. The wording itself is sufficient to show that each individual must be considered separately, and *Pym v. Great Northern Railway Co.*, so decides.”

It is apparent that, whatever method of calculation may be used, the object is to ascertain the loss to each dependant, and there is in my opinion, nothing to prevent a court from approaching the cases of the various dependants individually if it is more convenient. That was done in *Muirhead v. Railway Executive* (7), in which Singleton, L.J., said (p. 133 of Kemp and Kemp):

“(I am taking these two cases separately because that is the more convenient way of considering them, rather than dealing with joint dependency and then dividing up.)”

Another case exemplifying the individual approach is *Lloyds Bank, Ltd. and Mellows v. Railway Executive* (9), [1952] 1 All E.R. 1248. Whatever the method of calculation adopted it is clear that the expected length of the individual dependencies is a relevant factor. That is why the possibility of the remarriage of a widow is taken into account and if she remarries, her dependency may cease entirely, as was the case in *Mead v. Clarke Chapman & Co. Ltd.* (10), [1956] 1 W.L.R. 76. In *Phipps v. Cunard White Star Co. Ltd.* (11), [1951] 1 T.L.R. 359 the dependencies of infant children were estimated to terminate at sixteen years as, in the particular station of life of the parties, it could not have been expected that the deceased would have continued to support the children after that age. In my opinion, in the present case the learned judge did not give adequate, or indeed any, consideration to the question of duration of dependencies but appears to have assumed their continuance in all cases over the full period of the expectancy of working life of the deceased.

Counsel on both sides requested this court, if it came to the conclusion (as, for myself, I have done) that the learned judge had misdirected himself in important aspects of the case, not to send the issue back for re-trial but itself to assess the damages. Acknowledging as I do the general undesirability of re-trials I propose to make the attempt though with reluctance, as the evidence is meagre indeed, and there are many imponderables. There is no evidence at all, for example, as to whether, on marriage, the daughters might expect dowry or any subsequent benefit from their father. Such matters will therefore have to be resolved against them as it was for them to prove their damages.

The first question is whether the respondent and all the other children upon whose behalf the action was brought, were dependent upon the deceased, whether they were dependent fully or only partially, and what was the probable duration of their dependency. The evidence from the family itself on this topic consisted of no more than two sentences from the respondent. She said— “All living with deceased. He kept us all”. She was not cross-examined upon this. Evidence was given by Mr. B. N. Shah, accountant, who had kept the accounts of the deceased from the year 1956, and who produced (a) Trading and Profit and Loss Account for the year ended December 31, 1958, (b) a Balance Sheet as at December 31, 1958, and (c) a List of Assets and Liabilities as at August 31, 1959, the date of death. There are indications in the last-mentioned document that it was prepared for the purposes of estate duty—the court was informed from the bar that the filing of such accounts was still required though the rate of estate duty in Uganda had been reduced to “Nil”. The deceased was apparently a careful man with due thought for his family. He seems to have insured his life quite substantially but the proceeds of the insurance are not included in the assets to be considered in relation to this action. He had placed a number of shares in the name of his wife and six of his children; there was also a fixed deposit in the name of his wife.

The relevance of the statements of account to the question now under consideration lies in certain entries relating to the employment in the business of his daughters Dolatkhanu (now deceased) and the respondent, and his sons Sadrudin and Badrudin. The first three (judging from the balances brought forward in their names) had been employed for varying periods and the last mentioned apparently was employed from January 1, 1959. The sons were credited with salary at the rate of Shs. 3,900/- per annum and the daughters at Shs. 2,900/- per annum. The list of assets and liabilities shows a credit balance of Shs. 26,400/- in the account of Dolatkhanu, which is the same amount as appears to her credit in the balance sheet as at December 31, 1958. She received no credit after that date, though it can be assumed that she did not cease to work as she was with her father in the car when they were both killed and Mr. Shah said that all the children were living with the deceased at the time of his death. In the cases of the respondent and Sadrudin the lists of assets and liabilities showed credit balances as at December 31, 1958, salary was added for the intervening eight months and then a round sum was deducted for “food expenses etc.”. In a breakdown of the drawings of the deceased for 1958, subjoined to the trading and profit and loss account there are deductions of proportionate round sums in respect of Dolatkhanu, the respondent and Sadrudin.

It seems obvious that these accounts were not operated on by the various children concerned. They did not “draw” on them; if they had, Dolatkhanu’s balance would not have remained unaltered for the eight months prior to her death. The deductions were obviously artificial—for example, those in respect of the two daughters for 1958 were exactly Shs. 1,500/- each. The accountant Mr. Shah, who prepared these statements, gave in evidence that according to the books (in 1958) three children were drawing a small salary of Shs. 90/-,

presumably per month. He was not asked to explain why the accounts which he prepared showed something else.

Upon this unpromising and unworthy material the court is asked to find whether these particular children were dependants. If the statements of account are true representations of the legal relationships between the children and the deceased then the deceased was crediting them with substantial salaries and charging them smaller amounts for food and other expenses. That would indicate that they were not dependent upon him (except as an employer) or would at least reduce the amount of their dependency to a minimum. Counsel for the respondent submitted that the accounts did not represent legal relations but were probably for taxation purposes. Counsel for the appellant company, on the other hand, invited the court to accept the entries in the accounts as showing what they purported to show—that the children concerned were genuinely employed at the wages shown. I think that I must accept this submission. The accounts were put forward on behalf of the respondent and though she might not be completely bound by them, to any extent that she proposed to ask the court to disregard them, it was for her to call evidence to support her contention. As it was, although the respondent, the two sons Sadrudin and Badrudin, and the deceased's accountant, Mr. Shah, all gave evidence in the court below, not one of them was asked any question to throw light on these entries in the accounts. This is a matter which ought not to have been left to speculation and I must therefore hold that the respondent, Sadrudin and Badrudin, were not dependants but were gainfully employed at remuneration exceeding the cost of their maintenance. The death of the deceased does not affect the matter as there is evidence that Sadrudin and Badrudin have since operated a shop, and the respondent has since married. If it might be thought that in spite of their employment there was some small residual dependency in the case of these children it would in any event be less than the benefit receivable by them from the estate of the deceased, which is discussed below. Finally on this topic, it would appear most unlikely that the family as a whole would have derived much benefit if the submission of counsel for the respondent had been accepted; in that case the liabilities to the children, including Dolatkhanu, shown in the statement of assets and liabilities, totalling Shs. 51,805/-, must have been regarded as fictitious and the value of the estate as correspondingly increased. That of course would decrease the amount of damages to be awarded.

I come now to the question of the duration of the dependencies of the surviving dependent children. The expectancy of life of the deceased I have accepted as being fifteen years but there is no reason to suppose that he would have been called upon to support the remaining members of the family during the whole of that period; in fact the evidence of the accounts already discussed is against that view. In the case of sons I would deem it reasonable to fix the age of twenty-one years as that at which they could be expected to be self-supporting. In the case of daughters the question of marriage has to be considered; there is no evidence concerning dowry, and in the absence of any evidence to the contrary I must assume that dependency would cease on marriage. The respondent married at twenty-three and Zarina at eighteen. On the other hand the eldest daughter Dolatkhanu, who must have been at least twenty-four, was still unmarried when she was killed. In the case of the unmarried daughters I think it is reasonable to treat their dependencies at an end at the age of twenty-five, which means that that of Shah is ten years and that of Nazma fifteen years, being the expectancy of life of the deceased. The dependency of Zarina, who married a little over one year from the death of the deceased, is limited accordingly to one year.

The annual value of the total dependency must next be looked at. The learned judge took the sum of £744 as the net average earnings of the business over five years, and then said he was satisfied that the deceased would have

continued to pay out between £10 and £12 per week for the benefit of the children. Counsel for the respondent pointed out that there was also over £200 interest derived from a fixed deposit with the Diamond Jubilee Investment Trust Ltd., which was not brought into the profit and loss account. Counsel submitted that the most reliable guide to what was spent on the family was an answer given by Mr. Shah to the court:

“Q. Having looked after his books for nearly five years would you say he spent nearly three-quarters of his earnings on his family?

“A. Yes.”

The reference, in counsel’s submission, was to the income from the shop—not the interest—but, as I understood him, he suggested that the nominal salaries of £485, which were credited but not actually paid to the children, should have been added to the average net profit for the purpose of calculation. There is nothing to show that this is what Mr. Shah meant. Counsel also submitted that the breakdown of drawings was no guide as it had no necessary relation to profits. I agree on the point of relationship to profits, but nevertheless consider that the breakdown for 1958 which is before the court is not to be neglected as a partial check on the learned judge’s figure. Items under the following headings,

“Education, light charges, houseboy, ration material, cash for house expenses and additional expenses including goods from the shop”,

totalled £684—I disregard the sums purportedly deducted for the food and expenses of the three children who worked in the shop. It is too speculative to attempt a varying apportionment of this sum of £684 between the parents and children; the deceased had income outside the shop profit and may or may not have used part of it for personal expenses. Therefore, if the amount is divided per capita the amount allocated to the nine children would be roughly £560 per annum which corresponds with the learned judge’s £10–£12 per week. I therefore accept his figure so far as the amount spent on the children is concerned. I will return to this question after dealing with the amount receivable by the surviving children from the estate.

The evidence as to the value of the estate is to be found in the list of assets and liabilities as at August 31, 1959. That shows an excess of assets over liabilities of Shs. 120,650/60 but counsel for the appellant company in his reply said that he could not quarrel with the submission that a fixed deposit of Shs. 23,000/- in the name of Mrs. Kassam, and shares valued at Shs. 8,225/- in the names of members of the family, should be excluded from the estate. That leaves a balance of Shs. 89,425/60.

As I have indicated, the deceased was apparently a man who had proper concern for his family’s interests and I think it proper to assume that the surviving children would have ultimately shared the estate of the deceased—in the absence of any guide I will assume that they would have done so in equal shares. Allowance will have to be made for the fact that Dolatkhanu would have had a share but I do not think it necessary to take into account the possibility that Mrs. Kassam might have survived her husband. There is no evidence of her age, but she had already had nine children, the eldest of whom, Dolatkhanu, would now have been not less than twenty-four years of age, and the deceased, at the date of his death was still in early middle age. I propose therefore to approach the problem of the appropriate deduction to be made in respect of the estate upon the footing of accelerated receipt, rather than present value. It will be necessary to consider also the probability that in fifteen years’ time the estate would have been increased by further savings, and also the element of the certainty of present receipt of the money as against the uncertainty of its future receipt, and the fact that a share would have gone to Dolatkhanu.

I have accepted the value of the estate as at the death of the deceased as Shs. 89,425/60. It is not possible to make any accurate estimate of the extent to which that sum might have been increased by savings over a period of fifteen years. The list of assets and liabilities includes over £7,000 in fixed deposits and shares in the names of the deceased and members of his family, but except for the fact that Mr. Shah said these moneys were “accumulated over the years” there is no evidence to show how long the saving process had been going on. The deceased invested £1,000 on March 1, 1959, and apparently the business was a good one, as it prospered even during the year of the boycott of Indian traders. I think it reasonable to say that a further £4,000 might well have been accumulated over the ensuing fifteen years. In *Nance v. British Columbia Electric Co. Ltd.* (6), the present value of the estimated savings was dealt with separately, as an addition to damages. The course I propose to take is to incorporate them into the calculation of the value of the acceleration of the receipt of the estate moneys, which I think is at least equally logical and has the same result. I arrive then at this proposition—the net value of the acceleration is the difference between the amount actually received (Shs. 89,425/60) and the present value of the same sum payable in fifteen years plus the present value of the estimated savings also payable after fifteen years; the difference must be diminished by an amount in respect of the uncertainty which I have mentioned above and the fact that Dolatkhanu (now deceased) might also have shared in the estate—this amount is almost completely speculative and I would fix it at Shs. 20,000/-. Working on a basis of simple interest at 5 per cent. I find that the present value of a sum receivable in fifteen years’ time is four-sevenths of that sum. Therefore the present value of the estate (Shs. 89,245/-) plus the estimated savings (Shs. 80,000/-) is four-sevenths of Shs. 169,425/- which is Shs. 96,814/-: after deduction of the sum of Shs. 20,000/- above mentioned the net result is Shs. 76,814/-. The amount actually receivable from the estate being Shs. 89,425/- the difference, or the value of the acceleration, is Shs. 12,611/-.

There is another factor which must be considered in relation to the benefit derived by the surviving children from the death of the deceased. The present action has been brought under the equivalent in Uganda of the Fatal Accidents Act, 1846, i.e. Part II of the Law Reform (Miscellaneous Provisions) Ordinance, 1953. Under Part III of the same Ordinance it is still open to the personal representatives of the deceased to bring a further action for damages in respect of the loss by the deceased of his expectation of happy life and for damage to his motor vehicle. (This was common ground between counsel; claims for these items were actually incorporated in the plaint but were apparently withdrawn, perhaps because the plaint was issued before letters of administration of the estate were granted.) Usually the two actions are combined and then no difficulty arises; any damages given under Part III of the Ordinance (in so far as they were receivable by the dependants) would have to be deducted from the damages awarded to the dependants under Part II. The difficulty which arises when no action has been brought under Part III was referred to by Lord Russell of Killowen in *Davies v. Powell Duffryn* (8), at pp. 658, 659:

“It was suggested that a difficulty would arise if, at the time of assessing the damages under the Fatal Accidents Act. no proceedings had been taken under the Act of 1934, and it was unknown whether any such proceedings would ever be taken. I see no real difficulty here. The authority assessing the damages could always take into account the possibility of such proceedings and make allowance accordingly. A difficult matter no doubt, and quite incapable of accurate valuation;”

Damages for loss of expectation of a happy life are never very substantial and there appears to be a suggestion in *May v. Sir Robert McAlpine & Sons (London)*

Ltd. (12), [1938] 3 All E.R. 85 that the fact that damages have been recovered under the Fatal Accidents Act would have the effect of reducing them further; we were informed by counsel for the respondent that the motor vehicle was worth very little—the claim originally made for it in this action but subsequently withdrawn, was for Shs. 3,500/-. The costs of such an action payable by the personal representatives would probably exceed the costs recoverable from the appellant if the action succeeded. Valuation of the possibility of the further action being brought and succeeding, is highly speculative but apparently must be attempted. I allot an additional benefit to the surviving children under this head of Shs. 2,000/-, which, with the Shs. 12,611/- in relation to the value of the acceleration of the estate makes a total benefit of Shs. 14,611/-.

I have accepted the estimate of the learned trial judge of the amount spent upon the children, of whom there were nine. The estimate of £10–£12 per week can be averaged at £11, a total annual dependency of £572. That is approximately £63 10s. 0d. per annum for each child and as the dependency of the daughter Zarina is limited to one year it is clear that the benefit receivable by her, arising out of the death of the deceased (one-eighth of Shs. 14,611/-) exceeds the value of her dependency—she is therefore not entitled to damages. I have already held that the respondents, Sadrudin and Badrudin, were not dependants, and it follows that only Shah, Amirali, Roshanali and Nazma are entitled to general damages. In accordance with what I have said earlier I estimate their dependencies respectively as ten years, nine years, eleven years and fifteen years. That is an average dependency of eleven and a quarter years which, multiplied by four-ninths of £572 = £2,860 or Shs. 57,200/-. This amount must be discounted as it would in the normal course have been applied for the benefit of the dependants in question over a number of years, and its equivalent as a lump sum payable at death must be arrived at. For the purpose of this calculation I have referred to Whitaker's Almanac (1961) p. 1046 and am content to accept eight and a half years' purchase of the equivalent annuity ($\frac{4}{9} \text{ths} \times £572$) as a sufficiently approximate guide to its present value. The result is Shs. 43,218/-. I have applied this principle at this stage as that was the approach adopted in *Nance v. British Columbia Electric Railway Co. Ltd.* (6); otherwise I would have been in some doubt as to whether it was not more logical to apply it to the net cash payable after deduction of the benefit receivable from the estate. As has been seen, the total benefit from the estate is Shs. 14,611/- of which these four dependants are entitled to four-eighths, or Shs. 7,305/-. After deduction of that figure there remains the sum of Shs. 35,913/- as general damages. This I would apportion among the four dependants as follows:

Shah	Shs. 7,981/-	Amirali	Shs. 7,183/-
Roshanali	Shs. 8,778/-	Nazma	Shs. 11,971/-

In addition to the general damages of Shs. 35,913/- there are agreed items of Shs. 1,000/- general damages to the respondent personally, Shs. 600/- special damages for funeral expenses and Shs. 320/- for medical expenses, bringing the total to Shs. 37,833/-.

In the final result I would allow the appeal to the extent that I would reduce the award of damages from Shs. 120,000/- to Shs. 37,833/- and order that the decree be amended accordingly. I would not disturb the order for costs in the court below but would order that the respondent pay three-quarters of the appellant company's costs of the appeal in this court. I would certify for two counsel.

Sir Alastair Forbes V-P: I concur and have nothing to add. The appeal will be allowed to the extent indicated in the judgment of the learned Justice of Appeal, and there will be orders in the terms proposed

by him.

Sir Owen Corrie Ag JA: I also agree.

Appeal allowed. Damages reduced to Shs. 37,833/- and apportioned between four children found to be dependants.

For the appellant company:

Ivor Lean QC and K Chand

For the respondent:

PJ Wilkinson QC and BE de Silva

For the appellant:

Advocates: *Chand & Mehta*, Kampala

For the respondent:

Wilkinson & Hunt, Kampala

The Commissioner of Customs and Excise v Shah Karamshi Panachand and Company

[1961] 1 EA 303 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	13 April 1961
Case Number:	45/1960
Before:	Sir Alastair Forbes V-P, Sir Owen Corrie Ag JA and Mayers J
Appeal from:	H.M. Supreme Court of Kenya–Rudd, J

[1] *Customs – Onus of proof as to origin of goods imported – East African Customs Management Act, 1952, s. 158, s. 161, s. 165, s. 167 and s. 171 – Indian Evidence Act, 1872, s. 32 and s. 104.*

[2] *Evidence – Statement by person “whose attendance cannot be procured” – Proof – When contents of such statement acceptable as evidence of truth – Indian Evidence Act, 1872, s. 32 and s. 104.*

Editor’s Summary

The respondents had imported cotton waste blankets stated to be of West German origin for which no import licence was necessary. After entry of the blankets into Kenya the Customs Department seized them on suspicion that they were of East German origin. The respondents then brought an action in the Supreme Court of Kenya claiming the blankets and at the hearing a partner of the respondents gave evidence and produced the invoice and bill of lading relating to the blankets. The invoice stated the

country of origin as Western Germany and included a certificate purporting to be signed by the confidential clerk to the exporters at The Hague, certifying that the particulars in the invoice were true. Under s. 167 (b) of the East African Customs Management Act, 1952, the onus of proving the place of origin of the blankets lay on the respondents. The trial judge held that the invoice and bill of lading were admissible as evidence of the country of origin of the blankets and in the absence of any evidence to the contrary ordered the blankets be returned to the respondents and awarded them the costs of the suit. The appellant thereupon appealed against the order for the release of the blankets and the award of costs. The main ground on appeal was that the trial judge had erred in law in holding that the contents of the invoice and bill of lading were admissible under s. 32 (2) of the Indian Evidence Act to prove the country of origin of the goods and counsel for the appellant contended that no foundation of evidence had been laid which would enable the statements contained in the invoice to be accepted as evidence of their truth.

Held –

- (i) (Corrie, Ag. J.A. dissenting) whether admissible or not the bill of lading purported only to state that the shipping marks on the bundles of blankets included the words “Made in Western Germany” and in this case, it was valueless as evidence of origin of the blankets.

- (ii) the respondents had not discharged the onus of proving the place of origin of the blankets as required by s. 167 (b) of the Act.
- (iii) (Corrie, Ag. J.A. dissenting) the provisions of s. 32 of the Indian Evidence Act, 1872, had not been observed and there was therefore no evidence on which the judge could hold that the statements in the invoice were admissible; consequently, the invoice was of no value as evidence of origin.
- (iv) s. 171 (3) of the Act did not apply to proceedings brought against the Commissioner of Customs and Excise in his representative capacity under s. 165 and in such a case the relevant provision as regards costs was sub-s. (2) of s. 165.

Appeal allowed with costs. Order that the blankets be condemned.

Cases referred to:

- (1) *Commissioner of Stamp Duties, Straits Settlements v. Oei Tjong Swan*, [1933] A.C. 378.
- (2) *Mohamed Taki v. R.*, [1961] E.A. 206 (C.A.)

April 13. The following judgments were read:

Judgment

Sir Alastair Forbes V-P: This is an appeal from a judgment and decree of the Supreme Court of Kenya whereby it was ordered that certain goods seized by the Customs authorities be returned to the respondent firm, and that the appellant, the original respondent, pay the respondent firm its taxed costs of the case.

The matter came before the Supreme Court on a claim for the recovery of the goods seized made pursuant to s. 161 (1) (a) of the East African Customs Management Act, 1952 (hereinafter referred to as “the Act”). The goods in question were seven bundles, said to contain 697 pieces, of cotton waste blankets (hereinafter referred to as “the blankets”) imported into Kenya by the respondent firm. The respondent firm had not procured a licence for the importation of the blankets, which purported to have been made in Western Germany. It was common ground that under the import licensing regulations in force no import licence would be required for the importation of the blankets if they were of Western German origin, but that such a licence would be necessary if the blankets were of Eastern German origin. The blankets in the first instance were allowed to enter Kenya by the Customs authorities, but subsequently, as a result of information received, were seized as restricted goods liable to forfeiture under s. 155A of the Act. The appellant’s defence to the claim for the recovery of the blankets alleged that they were of Eastern German origin. Sub-section (4) of s. 161 of the Act provides that where proceedings have been instituted in accordance with that section for the recovery of goods seized by the Customs, (a) if the court is satisfied that the goods were liable to forfeiture under the Act, such goods shall be condemned; and (b) if the court is not so satisfied, such goods shall be released to the claimant. The crux of the matter in the proceedings in the Supreme Court was, as stated by the learned judge, that if the blankets were of Western German origin the respondent firm was entitled to succeed, but if the blankets were of Eastern German origin they were liable to be condemned. Under s. 167 (b) of the Act:

“the onus of proving the place of origin of any goods . . . shall be on the person . . . claiming anything seized under this Act”.

At the trial the only witness called for the respondent for the respondent firm was Karamshi Panachand, a partner in the firm. His evidence was to the effect that he believed

the blankets to be of Western German origin and had imported them as such, and he produced, as evidence to support his assertion that the blankets were of Western German origin, the invoice and the bill of lading relating to the blankets. The witnesses called for the appellant merely indicated that the blankets had been seized on suspicion, arising from information received, that they were of Eastern German origin. The learned judge said:

“Now the only evidence before me as to the country of origin, is the fact that in the supplier’s invoices they are stated as being of Western German origin and the bills of lading state that the shipping marks included the words ‘Made in Western Germany’.

“There is no admissible evidence to show that they were made anywhere else.”

It was contended that the contents of these documents were mere hearsay and should be disregarded, but the learned judge said:

“I cannot agree with that. I consider them *prima facie* evidence and to be admissible under s. 32 (2) of the Indian Evidence Act.

“I am quite satisfied that ordinarily they are treated in commercial circles as *prima facie* evidence. The Customs accept this as such in the absence of evidence to the contrary and did so in the present instance when the import was allowed, and the goods were released. I therefore hold this to be *prima facie* evidence of their contents until the contrary is shown.”

He continued:

“I consider that the contrary has not been shown. All that can be put against them is the legally unproved and unprovable hearsay from a disgruntled business man who has not been called as a witness. I do not consider that sufficient to rebut the evidence of the shipping documents.”

He accordingly ordered the release of the blankets to the respondent firm. An application was then made on behalf of the appellant for leave to recall a witness to prove reasonable grounds for seizure with a view to securing that, in pursuance of s. 171 of the Act, no order should be made against the appellant in respect of costs. The learned judge refused to hear such evidence, and awarded costs to the respondent firm as stated above.

The appellant now appeals both against the order for the release of the blankets and against the award of costs. The first two grounds of appeal, which relate to the order for the release of the blankets, are as follows:

“that the learned judge—

- (1) erred in law in holding that the contents of the documents given in evidence by the respondents were admissible under s. 32 (2) of the Indian Evidence Act to prove the country of origin of the goods the subject matter of the suit when such contents were not admissible under such section or at all;
- (2) alternatively, if the contents were so admissible, erred in law in holding that they were sufficient to discharge the burden of proof, upon the respondents, of proving the country of origin of the goods in question.”

As stated by the learned judge, the only items of evidence to prove the origin of the blankets were the bill of lading and the invoice. It was contended in this court that though the bill of lading and the invoice might be admissible as documents relating to the goods the subject matter of the proceedings, yet they could not be taken as evidence of the truth of the statements contained

therein unless such statements had been properly admitted under s. 32 of the Indian Evidence Act.

I think the bill of lading as evidence of origin can be disposed of summarily. Whatever the position as regards its admissibility, it purports to do no more than state that the shipping marks on the bundles of blankets included the words "Made in Western Germany". In certain circumstances the shipping marks might be receivable as evidence in the nature of an admission against an importer, but I do not see how otherwise they can be of any value to establish the origin of goods. Nothing is known as to when and by whom the marks were affixed. I would hold that the bill of lading in this case is valueless as evidence of origin of the blankets.

The invoice sets out on its face details of the blankets, the price thereof, and the marks and numbers on the packages; and in the first column headed "Country of Origin" carries the words "W.-Germany". On the back of the invoice is a printed form of certificate with blanks for completion which purports to have been completed and signed by one D.J. Blok, stated to be confidential clerk to European Manufacturers Agencies of The Hague, the suppliers of the blankets to the respondent firm. The material part of this form of certificate reads as follows:

"Kenya, Uganda, Tanganyika and Zanzibar.

Combined Certificate of Value and Invoice in respect of Goods for
Importation into Kenya, Uganda, Tanganyika and Zanzibar.

I, D.J. Blok, *confidential clerk of European Manufacturers Agencies of The Hague, supplier of the goods enumerated in this invoice amounting to £1,847.1.8, hereby declare that I have the authority to make and sign this certificate on behalf of the aforesaid supplier and that I have the means of knowing and do hereby certify as follows:

Value

1. That this invoice is in all respects correct and contains a true and full statement of the price actually paid or to be paid for the said goods, and the actual quantity thereof.
2. That no different invoice of the goods mentioned in the said invoice has been or will be furnished to anyone; that no arrangements or understanding affecting the purchase price of the said goods have been or will be made or entered into between the said exporter and purchaser or by anyone on behalf of either of them either by way of discount, rebate, compensation or in any manner whatever other than as fully shown in this invoice, or as follows . . . no spec, agreement.

Dated at The Hague this 23rd day of April, 1958.

Signature of witness: (illegible).

Signature: European Manufacturers Agencies

D.J. Blok.

*"The person making the declaration should be a principal or a manager, chief clerk, secretary or responsible employee."

It is to be noted that this certificate, although it states that the "invoice is in all respects correct", is clearly directed primarily to value. I am not aware of any legislative authority authorising the use of this form of certificate, but Mr. Garwell, the chief investigating officer, Customs and Excise, who gave evidence for the appellant, stated that the Customs authorities would accept

invoice as showing the country of origin where they had no information to the contrary.

The material provisions of s. 32 of the Evidence Act in so far as it applies in this case are as follows:

- “32. Statements, written or verbal, of relevant facts made by a person . . . whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases:

.....

- “(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty, or of any acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.”

Section 104 of the Evidence Act provides that the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Counsel for the appellant contended that no foundation of evidence had been laid which would enable the statements contained in the invoice to be accepted as evidence of their truth; that therefore there was in fact no admissible evidence before the court to indicate the origin of the blankets; and that therefore the respondent firm had failed to discharge the burden of proof laid on it by s. 167 (b) of the Act.

I think there is force in this contention. It is true the learned judge specifically referred to s. 32 (2) of the Evidence Act in his judgment. But I do not think that he had the evidence before him which would enable him to find the necessary facts to make the invoice admissible under that section. It is to be noted that (in relation to the particular circumstances of this case) for a statement to be admissible under s. 32 of the Evidence Act it is to be shown by the person seeking to have such statement admitted—

- (a) that the attendance of a person making the statement cannot be procured without an amount of delay or expense which appears to the court to be unreasonable;
- (b) that the document is a document used in commerce;
- (c) that the document was written or signed by the person whose attendance it is unreasonable to procure.

In Woodroffe’s Law of Evidence (9th Edn.) at p. 340 the learned author says, in relation to s. 32 (2) of the Evidence Act:

“The person wishing to give the evidence must give extrinsic proof . . . of the existence of the other circumstances conditional to the admission of this evidence. Similar evidence of the ordinary course of business will also be necessary. Where the statement is a written one, evidence must be given that it is in the handwriting of the person alleged to have made it; and this may be done by calling a witness who saw him write it or who is conversant with his handwriting.”

In the instant case the all important statement is the certificate of D.J. Blok that “this invoice is in all respects correct”. Apart from s. 32 of the Evidence Act I do not think that this certificate would carry any evidential value whatever. As I have stated, I am not aware of any legislative sanction for the certificate.

The fact that similar certificates may be accepted by the Customs authorities as a matter of practice does not constitute them evidence of the truth of their contents in a court of law except as provided by the Evidence Act. Departmental practice does not control the interpretation of a statute (*Commissioner of Stamp Duties, Straits Settlements v. Oei Tjong Swan* (1), [1933] A.C. 378 at p. 391). In Halsbury's Laws of England (3rd Edn.) Vol. 15 at p. 371 it is stated:

"At Common Law, certificates of matters of fact not coupled with matters of law are usually said to be inadmissible, even though given by the Sovereign under the sign manual. If a person is bound to record a fact, the proper evidence thereof is, it has been considered, a copy of the record, duly authenticated; but as to matters he is not bound to record, his certificate, being extra-judicial, is merely the unsworn statement of a private person, and as such will be rejected."

In the instant case no evidence was given to show that the delay or expense involved in calling D. J. Blok as a witness would be unreasonable. It may be that the court might take judicial notice of the distance between Nairobi and The Hague and infer that the bringing of a witness to Nairobi from The Hague in relation to this particular case would be unreasonable. In *Mohamed Taki v. R.* (2), [1961] E.A. 206 (C.A.) this court suggested, though it did not decide, that such an approach would be legitimate. Assuming, though not deciding, that the court would be entitled to make such an inference, I still do not think that the respondent firm have established the authenticity of the certificate on the invoice. I would accept that the invoice with the certificate is, on the face of it, "a document used in commerce". But no evidence whatever was given to establish the existence of the signatory, D.J. Blok, to establish his status and authority for signing, or, indeed, to show that the signature was his. The certificate, it is true, states that D. J. Blok is the confidential clerk to the European Manufacturers Agencies, but until the certificate is admitted as evidence of its contents this statement has no evidential value. It may be that if the statements in such an invoice as the instant one are not challenged, the invoice may be accepted by the court as an undisputed document, but, where the statements are challenged, the provisions of s. 32 of the Evidence Act must be observed. There may be cases where it is difficult to lead the evidence to establish the foundation necessary for the admission of a statement under the section, but that is not a reason for ignoring the provisions of the section. In the instant case it does not seem that undue difficulty would have arisen, since Karamshi Panachand indicated that the suppliers were a "sister firm" in Holland of a well-known company operating in East Africa. If this is so it seems probable that some member of the East African company would be in a position to give evidence as to the existence, status and writing of D. J. Blok.

In the result I think the appellant's contention is sound, and that there was no evidence before the Supreme Court on which it could hold that the statements in the invoice were admissible under s. 32 of the Evidence Act; and that the invoice accordingly was of no value as evidence of origin. It follows that I do not think the respondent firm discharged the burden of proof laid on it by the Act, and that I am of opinion that the appeal ought to succeed. I would allow the appeal with costs, set aside the judgment and decree of the Supreme Court and order that the blankets be condemned and the costs of the appellant in the Supreme Court be paid by the respondent firm.

In the view I have taken the appellant's appeal in relation to the order for costs made by the Supreme Court does not arise. I would, however, express the view that it does not appear to me that s. 171 (3) of the Act applies to proceedings brought against the Commissioner of Customs and Excise in his representative capacity under s. 165 of the Act. In such case the relevant provision as regards costs appears to me to be sub-s. (2) of s. 165 of the Act.

Sir Owen Corrie Ag JA: This is an appeal by the Commissioner of Customs and Excise in his representative capacity against the decision of the Supreme Court of Kenya given on March 10, 1960, whereby the appellant was ordered to release to the respondents certain goods which had been seized by an officer of the Customs under s. 158 of the East African Customs Management Act and to pay the respondent's costs.

The material facts are set out in the judgment of the learned trial judge as follows:

"The facts of this case are that the plaintiffs, a firm dealing in cotton blankets gave two indents to T.O.M. Co., in Nairobi, for the supply to them of a total of 990 bales of cotton blankets c.i.f. Mombasa. The indent was accepted and the bales were shipped to Mombasa in a number of shipments the last of which arrived on 20.11.58.

"The plaintiffs duly accepted delivery of each consignment as it arrived, against documents which showed that the goods were supplied by a firm called European Manufacturers Agencies of The Hague, which is said to be a sister organisation of T.O.M. Co.'s and that they were shipped from Hamburg, the supplier's invoice stated that the goods were of Western German origin and the bill of lading showed that they bore shipping marks indicating that they were made in Western Germany.

.....

"The import of these goods was controlled by the Defence Control of Imports Ordinance, 1941, under which the position at the relevant time, was that if the goods were of Western German origin they would be imported on an open general licence, but if they were of Eastern German origin they could not be imported without a specific licence by the Import Controller.

"The administrative procedure as regards the open general licence meant in effect that the goods could be imported without any licence and arose out of a public communique No. 4 issued by the Department of Trade and Supplies which declared certain goods to be on open general licence, and stated that such goods could be imported, *inter alia* from O.E.E.C. territories without prior reference to the Department of Trade and Supplies.

"In order to be entitled to this procedure the goods had to originate in those territories, or in the sterling area or in certain other territories specified in the communique and not including East Germany.

"After importation the goods were allowed into the Colony by the Customs and Excise without any question being raised as to the legality of the importation and some of them were released upon payment of customs duty. Seven of the bales so released were later seized by Customs Officers, under s. 158 of the E.A. Customs Management Act, 1952.

"The plaintiffs duly submitted a claim under the Act for the release of the goods. The Customs authority refused the claim and required the plaintiffs to institute proceedings to establish their rights.

"The plaintiffs then instituted the present proceedings claiming the release of the said seven bales."

The learned judge then observed:

"The crux of the matter is this; if the goods are of Western German origin the plaintiffs are entitled to succeed, but if the goods are of E. German origin they are liable to be condemned."

The evidence tendered by the respondents consisted of an invoice and a bill of lading. The invoice, relating to 115 bales of cotton waste blankets, is headed:

“Place: The Hague.

Date: 30th Sept. 1958.

“Invoice of cotton waste blankets consigned by European Manufacturers Agencies of The Hague to Messrs. Karamshi Panachand of Nairobi to be shipped per m.s. ‘Disa’.”

In the first column of the particulars headed “Country of Origin” there is the entry “W.–Germany”.

The invoice is endorsed with a certificate in the following terms:

“I, D. J. Blok, confidential clerk of European Manufacturers Agencies of The Hague, supplier of the goods enumerated in this invoice amounting to £3,341.14.1, hereby declare that I have the authority to make and sign this certificate on behalf of the aforesaid supplier and that I have the means of knowing and do hereby certify as follows:

Value

1. That this invoice is in all respects correct . . .”

The bill of lading shows that 115 bales of cotton waste blankets were shipped at Hamburg on board the “Disa”. The column of particulars headed “Marks and Numbers” contains the words “Made in Western Germany”.

It was not disputed that these documents covered the goods seized.

No evidence was tendered by the appellant.

Dealing with the documents tendered by the respondents, the learned trial judge said:

“It has been suggested that the shipping documents should be disregarded as hearsay. I cannot agree with that. I consider them *prima facie* evidence and to be admissible under s. 32 (2) of the Indian Evidence Act.

“I am quite satisfied that ordinarily they are treated in commercial circles as *prima facie* evidence. The Customs accept this as such in the absence of evidence to the contrary and did so in the present instance when the import was allowed and the goods were released. I therefore hold this to be *prima facie* evidence of their contents until the contrary is shown.

“I consider that the contrary has not been shown. All that can be put against them is the legally unproved and unprovable hearsay from a disgruntled business man who has not been called as a witness. I do not consider that sufficient to rebut the evidence of the shipping documents.

“On the evidence I find that the country of origin is West Germany. I am not satisfied that the goods are liable to forfeiture.”

The relevant provisions of s. 32 (2) of the Indian Evidence Act, to which the learned judge referred, are as follows:

“Statements written or verbal, of relevant facts made by a person . . ., whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases—(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of . . . a document used in commerce written or signed by him.”

The first ground of appeal is that the learned judge:

- “(1) erred in law in holding that the contents of the documents given in evidence by the respondents were admissible under s. 32 (2) of the Indian

Evidence Act to prove the country of origin of the goods the subject matter of the suit when such contents were not admissible under such sections or at all.”

The invoice, however, was properly before the court, having been put in evidence by the witness Karamshi Panachand as the document by virtue of which the goods were imported: and I am of opinion that the statement therein, certified as being correct on behalf of the exporters, that the country of origin of the goods was Western Germany is *prima facie* evidence of that fact: it has indeed been accepted as such on behalf of the appellant when the goods were released from the Customs.

The second ground of appeal is:

- “(2) alternatively, if the contents were so admissible, the learned judge erred in law in holding that they were sufficient to discharge the burden of proof, upon the respondents, of proving the country of origin of the goods in question.”

With regard to this submission, I am of opinion that had there been evidence to contradict the statement in the invoice as to the country of origin of the goods, it would have been incumbent upon the respondents to have submitted evidence in accordance with the provisions of s. 32 (2) of the Indian Evidence Act or to have led other evidence as to the country of origin. In the absence of evidence to the contrary, however, the statement in the invoice is, in my view, sufficient to discharge the onus of proof laid upon the respondents by s. 167 (b) of the Act; and I hold that the learned judge was right in his finding, on the evidence before him, that the country of origin of the goods was Western Germany.

The third, fourth and fifth grounds of appeal are as follows: that the learned judge—

- “(3) erred in law in refusing to hear further evidence, in relation to the matter of costs on the question of the reasonableness of the acts of the appellant in maintaining the seizure of the goods in question after a claim for their return had been made;
- “(4) erred in fact in failing to find that there were reasonable grounds for the acts of the appellant in seizing the goods in question and in not returning them to the claimant;
- “(5) erred in law and fact in awarding costs to the respondents.”

In consequence of the decision of the majority of this court upon the matters raised by the first and second grounds of appeal, the submissions made in the last three grounds do not arise. As, however, they were argued before us, I feel that I should express my agreement with the learned Vice-President’s view that it is s. 165 (2) and not s. 171 (3) of the East African Customs Management Act which governs the question of costs where the Commissioner of Customs and Excise is acting in his representative capacity.

Mayers J: I have had the advantage of reading the judgments delivered by the learned Vice-President and the learned Acting Justice of Appeal. In my view the certificate on the back of the invoice can be no more admissible in evidence without proof of its authorship than would be in any other case a relevant document purporting to be signed by someone whose signature was neither admitted nor proved. I therefore agree with the judgment and conclusion of the learned Vice-President.

Appeal allowed with costs. Order that the blankets be condemned.

For the appellant:

HB Livingstone (Senior Assistant Legal Secretary, East Africa High Commission)

For the respondent:

K Bechgaard QC and *AB Patel*

For the appellant:

Advocates: *The Legal Secretary*, E.A. High Commission

For the respondent:

AB Patel, Nairobi

The Attorney-General v Jerome Silvester Chisonga [1961] 1 EA 312 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	24 May 1961
Case Number:	28/1961
Before:	Sir Alastair Forbes V-P, Gould JA and Sir Owen Corrie Ag JA
Appeal from	H.M. High Court of Tanganyika–Williams, Ag. J

[1] Criminal law – Corruption – Principal and agent – Union secretary obtaining money to remove boycott – “Principal’s affairs or business” – Construction – Implication of words – Prevention of Corruption Ordinance, s. 3 (1) and (3) and s. 12 (T.) – Corrupt Practices Act, 1889.

Editor’s Summary

The respondent was convicted by a magistrate of corruptly obtaining Shs. 200/- for himself from an Indian tradesman as consideration for arranging on behalf of his employer, namely, Tanganyika African National Union, for the removal of a boycott on the tradesman’s shop in connection with certain goods manufactured in South Africa and sold in the shop. On the date of the offence this shop was being boycotted and was picketed, the boycott was organised by the Youth League of the Union which was under the control of the branch committee of the Union, of which branch the respondent was secretary. The respondent was not responsible for imposing or raising the boycott but he knew it was in progress and he went to the tradesman’s shop and said that for a present of Shs. 200/- he would settle the boycott. He was given an open cheque for Shs. 200/- which he cashed. The respondent’s appeal to the High Court turned up on the interpretation of s. 3 (1) of the Prevention of Corruption Ordinance which reads: “Any person who by himself, or by or in conjunction with any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to obtain, from any person for himself or for any other person, any consideration as an inducement to, or reward for, or otherwise on account of, any agent (whether such agent is the same person as such first mentioned person or not) doing, or forbearing to do, or having done or forborne to do, anything in relation to his principal’s affairs or business, shall be guilty of an offence”. The judge held that the key to the construction of the section appeared to be the word “corruptly” which governed everything up to and including “principal’s affairs” and that the principal’s integrity must be taken to be implied so that if “principal’s affairs” already governed by “corruptly” were qualified by “legal or illegal”, the word “illegal” would be a contradiction in terms. He assumed that the boycott was illegal and, reasoning that if the agent’s promise was made with reference to conduct of the

principal which was illegal, the promise could not have been corruptly made and accordingly he allowed the appeal. On further appeal the Attorney-General submitted that the judge had wrongly interpreted the section in the light of what he conceived to be the evil to be remedied, and that in so doing he had departed from the clear and plain meaning of the words. Counsel argued that a literal interpretation of the words neither negated the object of the Ordinance nor resulted in absurdity or futility and that no presumption arose that the “principal’s affairs or business” were necessarily lawful.

Held –

- (i) the word “corruptly” in s. 3 (1) did not govern “principal’s affairs”; if, as the judge suggested, the words “lawful” or “unlawful” had appeared in the section after “principal’s affairs” the court was unable to see what conflict would arise, or what would prevent an agent from receiving a consideration corruptly even though his principal’s affairs might be unlawful.

- (ii) to presume that when the legislature refers to such a matter as a principal's affairs or business, it has in mind lawful affairs or lawful business, would involve reading words of limitation into the legislation which is contrary to the ordinary rules of construction.
- (iii) no doubt in the present case the legislature had primarily in mind principals who were acting lawfully, but there appeared to be nothing in the context or objects of the Ordinance to induce the court to say that the legislature intended, contrary to the words used, to exclude principals who were not so acting.

Appeal allowed. Appeal remitted to the High Court with directions that steps be taken to secure the appearance of the respondent and to commit him to the proper prison to serve his sentence of imprisonment.

Cases referred to:

- (1) *R. v. Smith*, [1960] 1 All E.R. 256.
- (2) *Cooper v. Slade* (1858), 6 H.L. Cas. 746.
- (3) *Chimanlal Rugnath Thakkar v. R.*, [1959] E.A. 887 (C.A.).
- (4) *Haji Moledina v. R.*, [1960] E.A. 678 (C.A.).
- (5) *R. v. Ramzan Ahmed Jamal* (1955), 22 E.A.C.A. 504.

Judgment

The following judgment prepared by **Gould JA**: was read by direction of the court: The respondent in this appeal was convicted by a senior resident magistrate at Tanga of the offence of corruption contrary to s. 3 (1) of the Prevention of Corruption Ordinance No. 19 of 1958. The particulars set out in the charge were as follows:

"Jerome Silvester Chisonga alone, being the district secretary of Tanganyika African National Union, Tanga, on the 22nd day of July, 1960, within the township and district of Tanga, corruptly obtained for himself from one C. K. Patel, a trader, a sum of Shs. 200/- as a consideration for arranging on behalf of his employer, namely Tanganyika African National Union for the removal of a boycott on the shop of the said C. K. Patel in connection with certain goods manufactured in South Africa and sold by the said C. K. Patel in his shop."

The respondent's appeal to the High Court was allowed and the conviction was quashed. The Attorney-General now brings this appeal against the decision of the High Court upon grounds expressed in the memorandum of appeal as follows:

- "(1) That the learned judge erred in law in holding that if the promise of an agent is made with reference to conduct of his principal which is on the face of it illegal the promise cannot be said to have been corruptly made.
- "(2) That the learned judge erred in law in holding on the evidence that the sum of Shs. 200/- was not corruptly obtained by the respondent."

The appeal, being one from the High Court sitting in its appellate jurisdiction, may be brought on a matter of law but not on a matter of fact.

The respondent did not appear and was not represented before this court. The findings of fact by the

learned resident magistrate were fairly summarized by Mr. Dennison, who appeared for the Crown, and we are content to repeat his tabulation:

1. On the day of the alleged offence the shop of one C. K. Patel was being boycotted and was picketed.

2. The boycott was organized by the Youth League of the Tanganyika African National Union.
3. The Youth League at Tanga functioned under the control of the branch committee of the Tanga branch of the Tanganyika African National Union, of which branch the respondent was the secretary.
4. The respondent was not responsible for the imposition or raising of the boycott, but he was fully aware that the boycott was in progress.
5. On the material date, July 22, 1960, the respondent went to the shop of C. K. Patel and said that if he were given a present of Shs. 200/- he would settle the boycott.
6. He was given an open cheque for Shs. 200/- and cashed it soon thereafter.

The finding of the resident magistrate is contained in the following passage from his judgment:

“Accordingly, I find all the ingredients of count I proved, and I shall convict him accordingly. I may say here that whether or not accused was in a position to do what he was paid for, i.e. to raise the boycott, or whether he had any hand in doing so, is of course irrelevant to the question of his guilt; what is relevant is that he represented that he could and would do that, that C.K.P. believed him, and in that belief paid him the Shs. 200/-.”

The argument against this finding which found favour with the learned judge in the High Court is expressed in his judgment as follows:

“The boycott of goods at this shop must be assumed to have been illegal, as the prosecution did not seek to show that it was not, and the learned Crown Counsel conceded that there was merit in this ground and found himself for that reason unable to support the conviction although a different view of the point had resulted in the Attorney-General’s permission to prosecute being given. He submitted that the purpose of this legislation is likely to have been protection of principals, that it would in fact be ludicrous if a principal acting illegally could have an agent prosecuted for promising a third party that he would stop the illegal act (T.A.N.U. reported the matter to the police in the present case) and that the only justification for finding illegality of the principal irrelevant would be that the wording of the section is so definite to that effect as to preclude any other construction. No direct authorities on the point have been found, and it was not taken at the trial or dealt with in the judgment.”

The reasoning of the learned judge appears in the following paragraph of his judgment:

“The key to the construction of the section would appear to be ‘corruptly’ which governs everything up to and including ‘principal’s affairs’ and an appropriate definition of ‘corruption’ taken from the Shorter Oxford English Dictionary, to be ‘perversion of integrity by bribe or favour’. Principals are in fact protected by the civil law and although the Ordinance provides considerable further protection (payment to a principal of the amount or value of any consideration under s. 3 itself, and the making of the use of documents intended to mislead a principal an offence under s. 5), the basis of the offence of corrupt transactions by agents is perhaps best considered as recognition that the perversion of integrity as between principal and agent is worthy of punishment by the State. However in my view the principal’s integrity must be taken to be implied so that if ‘principal’s affairs’ already governed by ‘corruptly’ were qualified by ‘legal’ or illegal,

‘illegal’ would be a contradiction in terms. I therefore find it consistent with the most natural construction of the wording of the section itself that if the alleged promise of the agent is made with reference to conduct of the principal which is on the face of it illegal the promise cannot be said to have been corruptly made.”

Section 3 (1) of the Prevention of Corruption Ordinance (Cap. 400 Revised Laws of Tanganyika) reads as follows:

“3.(1) Any person who by himself, or by or in conjunction with any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to obtain, from any person for himself or for any other person, any consideration as an inducement to, or reward for, or otherwise on account of, any agent (whether such agent is the same person as such first mentioned person or not) doing, or forbearing to do, or having done or forborne to do, anything in relation to his principal’s affairs or business, shall be guilty of an offence.”

Before this court counsel for the Crown submitted that the approach of the learned judge was wrong in that he interpreted the section in the light of what he conceived to be the evil to be remedied, and in so doing he departed from the clear and plain meaning of the words. Counsel argued that the meaning of the words used was plain and that their literal interpretation neither negated the object of the Ordinance nor resulted in absurdity or futility. He submitted further that no presumption arose that the “principal’s affairs or business” were necessarily lawful. The crux of the matter is contained in this last submission. Is a corrupt agent to be exempt from liability under the section, and to be regarded as not corrupt, because the affairs of his principal are unlawful? We would interpolate here that counsel for the Crown stated that, under the law of Tanganyika, though the actual boycott may not have been an offence against the criminal law (it was probably tortious) the act of picketing was a criminal offence.

It is, with respect, difficult to understand exactly what the learned judge meant, in the passage of his judgment last quoted, when he said that the word “corruptly” in the section governed “principal’s affairs”. It does not do so, of course, as a matter of grammatical relation; in that sense it applies exclusively to the soliciting, accepting or obtaining (including agreements and attempts) of the consideration. If, as the learned judge suggested, the words “lawful or unlawful” had appeared in the section after “principal’s affairs or business” we are unable to see what conflict would arise, or what is to prevent an agent from receiving a consideration corruptly even though his principal’s affairs or business may be unlawful.

In *R. v. Smith* (1), [1960] 1 All E.R. 256 the Court of Criminal Appeal considered the object of the Public Bodies Corrupt Practices Act, 1889, and said that it was to prevent public officers and public servants from being put in a position where they are subject to temptation. The wording of that Act is not the same as that of the Prevention of Corruption Ordinance but there is a substantial degree of similarity. We would say that among the objects of the first two sub-sections of s. 1 of the Ordinance are those of preventing agents from being put in a position where they are subject to temptation and of deterring agents from taking advantage of their position as such to secure their own improper enrichment or advancement. Protection of principals is undoubtedly another, but having regard to the first two objects which we have mentioned we find no reason to strain for an interpretation of the Ordinance which would negative the punishment of an agent or a person who bribed an agent, merely because the affairs or business of the principal were unlawful. In so far therefore, as the learned judge appears to have extracted some meaning or force from the word

“corruptly” in s. 3 (1) by which he was induced in effect to insert the word “lawful” before the phrase “affairs or business” we are, with respect, unable to agree with him. As appears from the discussion of the case of *Cooper v. Slade* (2) (1858), 6 H.L. Cas. 746 in *R. v. Smith* (1) the word “corruptly” may add little or no meaning to the words it accompanies, but in the present case it has never been in dispute that the receipt by the respondent of the Shs. 200/- would have been corrupt had the affairs of the principal been lawful, and we are therefore not concerned with any aspect of the meaning other than the one discussed above.

As we are of opinion that nothing is to be drawn from the use in the section of the word “corruptly” which supports the construction adopted by the learned judge, it remains to be considered whether there is any other reason for saying that “principal’s affairs or business” ought to be construed as “principal’s lawful affairs or business”. The contrary view leads in our opinion, to no absurdity. It is the Crown which prosecutes, and decides when and whom to prosecute, and not the principal; illegal acts by the principal do not negative the illegality of the acts of the agent. From the other point of view, ought a corrupt agent to be permitted to escape merely because his principal is carrying on without a licence a business which the law prohibits except with a licence? Would an agent be entitled to escape because his principal’s business was in fact unlawful, but was, so far as the agent was aware, perfectly lawful and proper? Neither can it be said that to construe the words “affairs or business” literally, so as to include both legal and illegal, negatives the effect of the Ordinance or results in futility; it is a construction which excludes nothing from the scope of the Ordinance which would otherwise have fallen within it. There remains the final suggestion, which is that when the legislature refers to such a matter as a principal’s affairs or business, it is to be presumed that what it has in mind is lawful affairs or a lawful business. This would involve reading words of limitation into the legislation, which (in the absence of any compelling reason for doing so) is contrary to the ordinary rules of construction. Counsel quoted *Chimanlal Rugnath Thakkar v. R.* (3), [1959] E.A. 887 (C.A.) and *Haji Moledina v. R.* (4), [1960] E.A. 678 (C.A.) but did not claim that they provided any guidance on this subject; in our view they do not. There may well be cases in which the object or subject matter of an enactment, or the context, would require that references therein to such matters as “affairs” and “business” ought to be, or could only be construed as relating to lawful affairs or business. There can be no doubt that in the present case the legislature had primarily in mind principals who were acting lawfully, but we find nothing in the context or objects of the Ordinance which would induce us to say that the legislature intended, contrary to the words used, to exclude principals who were not so acting. Section 3 (b) of the Ordinance is of interest and reads as follows:

“(b) in addition, the court may—

- (i) where such person is an agent, order him to pay to his principal, in such manner as the court may direct, the amount or value of any consideration received by him or any part thereof; or
- (ii) where such person is an agent, order that he pay to his principal, in such manner as the court may direct, part of the amount or value of any consideration received by him, and that whole or part of the residue be forfeited; or
- (iii) whether such person is an agent or not, order that the amount or value of any consideration received by him, or any part thereof, be forfeited.”

The powers there conferred show clearly that one of the objects is the protection of the principal, but the power to order forfeiture (in which case, by s. 12, the moneys go to the general revenue) whether the person is an agent or not, gives the court power to ensure that an unworthy principal shall receive no benefit.

In our opinion the ordinary rule of construction should apply and no words of limitation should be read into the section. It follows that the appeal must be allowed and the conviction and sentence of the respondent be restored. Following what was done by this court in *R. v. Ramzan Ahmed Jamal* (5) (1955), 22 E.A.C.A. 504, we remit this matter to the High Court with directions that that court take all necessary steps to secure the appearance before it of the respondent and to commit him to the proper prison to serve his sentence of imprisonment.

Appeal allowed. Appeal remitted to High Court with directions that steps be taken to secure the appearance of the respondent and to commit him to the proper prison to serve his sentence.

For the appellant:

WN Dennison (Crown Counsel, Tanganyika)

The respondent did not appear and was not represented.

For the appellant:

The Attorney-General, Tanganyika

John Raymond Vaz v R [1961] 1 EA 320 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	14 June 1961
Case Number:	182/1961
Before:	Sir Ralph Windham CJ

[1] *Criminal law – Demanding money with menaces with intent to steal – Whether menaces or threats uttered – Whether menaces or threats such as to cause fear or alarm to reasonable man – Penal Code, s. 292(T.).*

[2] *Criminal law – Practice – Recall of witness – Defence request to recall prosecution witness refused – Whether refusal constitutes an irregularity or miscarriage of justice – Criminal Procedure Code, s. 151 and s. 206 (T.).*

Editor's Summary

The appellant, a poor man, discovered in the course of his employment that there was an established practice authorised by his employers of removing the tops of bales of cotton originating from a certain ginnery and replacing them with tops marked to indicate that the cotton originated from another superior ginnery. He collected all the physical, documentary and other evidence that he could, in order effectively to expose the practice, and having done so demanded a sum from his employers through their agent for keeping silent and restoring the evidence he had collected. The appellant was later charged with and convicted of demanding money with menaces from the agent contrary to s. 292 of the Penal Code and sentenced to eighteen months' imprisonment. The grounds argued on appeal were substantially whether the evidence for the Crown established the charge of demanding money with menaces, whether the evidence of the agent should have been accepted in view of his admitted negotiations with the appellant and whether the refusal of the magistrate when asked by defence counsel to recall a prosecution witness amounted to a miscarriage of justice.

Held –

- (i) the magistrate was justified in his conclusions of fact and law.
- (ii) the employers' agent was at no stage *particeps criminis* and even if he were an agent provocateur that did not make him an accomplice; therefore, the contention that he should have been treated as an accomplice could not be sustained.
- (iii) the magistrate's refusal to recall a prosecution witness could not have occasioned a failure of justice.

Appeal dismissed.

Cases referred to:

- (1) *R. v. Collister and Warhurst*, 39 Cr. App. R. 100.
- (2) *R. v. Boyle and Merchant*, [1914] 3 K.B. 339.
- (3) *R. v. Bernhard*, [1938] 2 K.B. 264; [1938] 2 All E.R. 140.
- (4) *Habib Kara Vesta and Others v. R.* (1934), 1 E.A.C.A. 191.
- (5) *Sheoprasad Singh v. Rawlins* (1901), 28 Cal. 594.

Judgment

Sir Ralph Windham CJ: The appellant was charged with, and convicted of, the offence of demanding money with menaces contrary to s. 292 of the Penal Code, the particulars of the charge being that he

“on the 23rd day of November, 1960, in the municipality and district of Dar-es-Salaam with menaces demanded the sum of Shs. 20,000/- of one Murray Alexander Carson with intent to steal the same”.

Mr. Carson, who gave evidence for the Crown as P.W. 5, was stationed in Nairobi, and was senior manager in East Africa of Ralli Brothers Limited, a company which deals in the purchase and export of cotton in East Africa on a large scale and whose head office is in London. The appellant worked as a clerk in the company's branch office in Dar-es-Salaam where it operated a godown.

The facts of the case, as established by the Crown evidence which was accepted by the learned trial magistrate, are described with particularity in his long and careful judgment. They may be epitomised here as follows. The appellant, who was financially in poor circumstances, discovered, during the course of his work in Ralli Brothers' office and godown in Dar-es-Salaam, that there was an established practice there, authorised by Ralli Brothers, of removing the tops of bales of cotton that originated from a certain ginnery, and replacing them with tops marked to indicate that the cotton originated from another and superior ginnery. In short, although there was an attempt to explain away and even to justify this course of action, by describing it in such euphemistic terms as a mere "selling technique", it is clear from the evidence that it was designed to deceive importers, and that it in fact was, and was known by Ralli Brothers and their officials to be, a piece of dishonest business practice and that it was against their business interests to allow it to be exposed. The appellant proceeded to collect all the physical and documentary and other evidence that he could, in order to be able effectively to expose the practice. Having done so, he was in a position to blackmail Ralli Brothers, through their agent Carson, into paying him for keeping silent and restoring the evidence he had collected. That is what the learned magistrate found that he eventually attempted to do, naming Shs. 20,000/- as his price.

The main evidence upon which the court made this finding consisted of two letters, exhibits 1 and 2, sent by the appellant to P.W. 3, the manager of Ralli Brothers at their London office and received by him on November 14, 1960, and the evidence of Carson himself.

On October 31, 1960, the appellant's employment with Ralli Brothers had been terminated, in accordance with the company's regulations, by the payment to him of a month's salary in lieu of notice. This was said to have been by way of "retrenchment", though it seems that the company had some other and more personal reason for wishing to terminate the appellant's employment with them. But, be that as it may, the appellant admitted in evidence that thereafter he had no legal claim against the company. Then, on November 10, he sent to the company's London office, in one envelope, the two letters to which I have referred, which arrived on November 14. One of them, exhibit 1, was the covering letter for the other, and it read:

"The attached is for your information, original and copies (to L.S.M.B. and others) together with confidential letters to the undermentioned will be posted on November 18, 1960. Until then everything connected with this is strictly confidential."

There followed a list of the "undermentioned", consisting of the names of nine firms, in Hong Kong, Japan, Germany, and other parts of the world, which imported cotton from Ralli Brothers. The other letter, exhibit 2, bore at the top of it the name of "The Director of Agriculture, Dar-es-Salaam" as the destined addressee, and it proceeded to relate the appellant's discovery of Ralli Brothers' shady practice with regard to the deceptive changing of the cotton-bale tops to suggest a ginnery origin other than the true one, giving a detailed description of that practice. The letter concluded—

"In the interest of commerce and Tanganyika, I trust that the board will take appropriate action in the matter."

Upon the receipt of these letters by the London manager, P.W. 3, who said he construed them “as an invitation to pay some money to keep the matter quiet”, the London office telephoned to their manager in Kampala, P.W. 4, who in his turn telephoned to Carson in Nairobi, and as a result these two both went to Dar-es-Salaam, where on November 18 Carson went to see the appellant at his shop. The appellant complained to him of his straitened financial circumstances and Carson, who was genuinely sorry for him, offered to help him; but no sum was mentioned and the matter was dropped. At this interview the appellant mentioned that he knew about the wrong practice at the godown, and that he

“might make Ralli Brothers assist him financially so that those letters should not be sent”,

and that they “should help him out of his difficulty”, and that

“the list of firms on his paper might be glad to receive this information if Ralli Brothers did nothing”.

On Carson then personally offering him the unspecified financial assistance to which I have referred, the appellant said that this should come from Ralli Brothers and not from him; and so, as I have said, the matter was temporarily dropped and the interview ended. But on returning to Dar-es-Salaam in four days’ time, on November 22, Carson, according to his own evidence, found a written message from the appellant, who knew he was returning. This message did not in terms mention any money payment, but it ended by saying that

“because of you and the promise to put my case to your London office I will delay the action just a little longer”.

Carson thereupon sent a note to the appellant suggesting an interview, to which the appellant replied with a very explicit note, exhibit 9, which said– “My appeal to your London office is for £2,500”. To this Carson replied, by a note, exhibit E, “I think we had better meet. I will call at your shop at 4 p.m. today”. All this happened on the same day, November 22, according to Carson. Carson then duly went to see the appellant at about 4 p.m. The interview was brief, Carson saying that he would consult his lawyer, which he proceeded to do. Next morning Carson received a further written message from the appellant, exhibit 8, saying– “I pray you pay me one last visit sometime now”. In response to this, he saw the appellant at 1.45 p.m. that same day, November 23, and on being asked what he wanted, the appellant

“said that if Ralli Brothers would pay him Shs. 20,000/– that would clear the whole matter–the whole matter would be finished”,

and that

“if we paid him Shs. 20,000/– he would deliver back to us what he had collected”.

Carson understood clearly what the appellant was referring to. This was the pith of the present charge against the appellant. Next day, according to Carson, he called on the appellant in the morning, and the appellant “confirmed that if he got Shs. 20,000/- he would hand over everything he had”, and Carson said that the matter would have to be put to the London office and that, if they agreed, the handing over would be done through his (Carson’s) lawyer. This was on November 24. In fact, the matter was thereupon placed in the hands of the police.

The appellant, in his evidence, denied that he ever demanded Shs. 20,000/- as the price of returning the documentary and other evidence and of keeping

silent. He said that it was Carson who offered him Shs. 20,000/–, and that this was simply to enable him to return to Goa and get him out of the way. The learned trial magistrate accepted the evidence of Carson and rejected that of the appellant on these points.

The grounds of appeal may be considered under three main heads: first, did the Crown evidence establish the charge of demanding money with menaces? Secondly, ought the Crown evidence to have been accepted beyond a reasonable doubt? Thirdly, was a certain alleged irregularity of procedure on the learned magistrate's part such that a miscarriage of justice may have resulted? There is also an appeal against the severity of the sentence.

With regard to the first point, the legal propositions to be borne in mind in deciding whether the Crown has established a case of demanding money with menaces with intent to steal, contrary to s. 292 of the Penal Code, are the following. First, the menaces or threats need not be uttered explicitly; it is sufficient if the menace, though veiled, is implicit in the circumstances in which the money was demanded, so that an ordinary reasonable man would read the menace into the demand: *R. v. Collister and Warhurst* (1), 39 Cr. App. R. 100, at p. 105. And in this connection, an accused person's intimation that

"I will refrain from doing so and so if you give me such and such a sum of money"

may in ordinary circumstances be properly held to contain the implicit converse threat—"I will do so and so if you do not give me such and such a sum of money". Secondly, while the menace must be calculated to, that is to say must be of such a nature as to be likely to, produce in the person menaced, considered as an ordinary reasonable man, some degree of fear or alarm such as would unsettle his mind, it is not necessary to show that it did in fact induce such fear or alarm in him; it is on the intention of the accused and the nature of the menace that the accused's guilt depends, rather than on the effect of the menace: *R. v. Boyle and Merchant* (2), [1914] 3 K.B. 339 at p. 345. Thirdly, in the event of the menace proving unsuccessful (as in the present case) the test is whether, if it had been successful and the money had been obtained:

"it would have been obtained in such circumstances that it could properly be said to have been stolen",

with particular attention to the question whether it had been taken fraudulently and without claim of right: *R. v. Bernhard* (3), [1938] 2 K.B. 264, at p. 270.

Bearing these propositions in mind as no doubt he did, the learned trial magistrate applied the law to the facts in the following passage from his judgment:

"I have carefully perused the case of *R. v. Boyle and Merchant*, [1914] 3 K.B. 339, in which a limited liability company was concerned. I do not see that there is any point in suggesting that Carson was not personally menaced by the accused as it was quite obvious that from the beginning he was acting as the senior manager of the company in East Africa.

"It is clear that since the accused admitted in cross-examination that he had no claim against the company (and I think this is quite obvious) and, since he did demand this money with menaces, he has an intention to steal.

"It is contended by the defence that the mind of nobody was disturbed or unsettled by the receipt of these communications in London and, in cross-examination Carson replied that he did not attach much importance to these letters as he felt that the accused was wrong but he did say this in his direct evidence 'We feared the posting of this letter as it might be misleading—it would make bad reading to the Secretary (meaning of

Agriculture). I did not want this letter to be sent. We thought it inadvisable and that it might certainly create difficulties. The difficulties I have in mind are that the Director of Agriculture might have wished to make enquiries and these enquiries would not have been welcome'. Added to this, we have seen the chain of action set up from London upon receipt of these communications from accused and it is clear that everything possible was done to prevent the letter from being posted. I have no hesitation in finding that the demand of Shs. 20,000/- made by accused on the afternoon of November 23, 1960, was clearly related to the threat contained in his shorter letter to London (Crown exhibit 1). I am of opinion that the threat made was a most serious one and that it caused deep fear in the minds of the various managers of Ralli Brothers and in particular in that of Mr. Carson and I do not see that he was acting as a free agent in his discussions with accused."

I can find no fault in the above passage, as regards either inferences and findings of fact or conclusions of law, save that it was not even necessary for the Crown to prove (as it did prove) that Carson's mind was in fact unsettled and alarmed by what the appellant threatened to do, provided that the threat was calculated and intended (as it manifestly was) to have that effect. In particular, the learned trial magistrate was in my view justified in his conclusions of fact and law: (a) that the appellant's actions constituted menaces, in fact and in law; they may in some degree have been veiled (though not in the later stages) but they were at all times understood to carry the threat of revealing Ralli Brothers' business practices, as the appellant intended that they should be understood; (b) that the two letters, exhibits 1 and 2, and the appellant's ultimate demand of Shs. 20,000/- from Carson were related to each other, the appellant obviously intending that the letters should lead to the kind of negotiations that in fact ensued and should place him in the advantageous position of a blackmailer; (c) that the appellant intended to steal the Shs. 20,000/-, to which he had no claim or right, with the result that if he had succeeded, his act would have been theft; (d) that the demand for the Shs. 20,000/- with menaces was proved to have been addressed to Carson, in accordance with the particulars of the charge, and that the fact that the appellant intended that the money should actually or eventually be paid by Ralli Brothers was immaterial, since the demand and menaces on November 23, which were the subject matter of the charge, were addressed to Carson in his capacity as manager and agent of Ralli Brothers.

I turn now to the question whether the learned magistrate was justified in accepting Carson's version of what occurred and was said in Dar-es-Salaam, between him and the appellant, as against the appellant's version. I will consider presently what effect a certain alleged irregularity of procedure might have had on this question of credibility; but leaving that aside, I am unable to see in what way the learned trial magistrate wrongly evaluated the evidence before him, or failed to consider any relevant evidence, or that his acceptance of Carson's version was in any respect perverse or against the general weight of evidence, documentary and oral. The judgment is a long and closely reasoned one, and I see no ground for interfering with any of the conclusions of fact contained in it. It has been pointed out (correctly) that the learned magistrate never considered the question whether Carson should be treated as an accomplice, and it has been suggested that his evidence ought to have been considered as being in the nature of an accomplice's evidence, on the ground that he was an agent provocateur. But Carson himself, who was believed, denied that he was any such thing, stating that he at no stage offered the appellant money to hold his hand and keep silent, or encouraged the appellant to demand it. His object in interviewing the appellant was simply to see what

he was up to, and what he wanted. He was at no stage a *particeps criminis*. Carson was corroborated by the police inspector, P.W. 1, on this point. And even if Carson were to be considered as an agent provocateur (which he was not), that would not make him an accomplice: *Habib Kara Vesta and Others v. R.* (4) (1934), 1 E.A.C.A. 191 is sufficient authority for that proposition. The contention that Carson should have been treated on the footing of an accomplice cannot therefore be sustained.

I come now to the alleged irregularity of procedure on the learned magistrate's part. When the first prosecution witness, Superintendent Brothers, was giving evidence, learned defence counsel asked to be allowed to put to him a certain written statement which Carson had made to him (Brothers) in the last week of November, 1960. The court refused this request, on the ground that the proper person to put the statement to in the first place was Carson himself, when he came to give evidence. Carson had made more than one statement to Superintendent Brothers, and they were in the hands of counsel for the defence before Carson was called. But no passage from any of these statements was put to Carson in cross-examination when he was called as P.W. 5, as they should have been if the defence wished to put them in evidence in the event of Carson contradicting them or denying having made them. At the conclusion of the whole case, however, after the appellant and his one witness had testified, learned defence counsel asked to be allowed to recall Superintendent Brothers (not Carson) to ask him whether or not Carson had made a particular statement to him, in one of the written statements to which I have referred, which conflicted with what Carson had said in court. The learned magistrate again observed that "this ought to have been put to Carson in cross-examination", and proceeded to rule that in the circumstances:

"I must rule that such a witness cannot now be called and I will (sic) call him".

In the context it seems probable that the word "not" has here been left out of the record by a slip of the pen, between the words "will" and "call", particularly as the learned magistrate did not call the witness but immediately proceeded to hear addresses on the case generally. But in any event I think that his reasons for declining to allow the defence to call him or (it would seem) to call him *ex proprio motu* under s. 151 of the Criminal Procedure Code, were sound. The statement should have been put to Carson in cross-examination, when he would have had the opportunity of denying or explaining it. It is urged that under s. 206 of the Criminal Procedure Code the defence had an absolute right to call Superintendent Brothers as their own witness, notwithstanding that he had already been called and cross-examined as a Crown witness, and that the court had no power to refuse to allow the defence to do this. But although there is no express provision in s. 206, nor elsewhere in the Code, that the defence may not call as their own witness one who has already been called as a Crown witness, it is implicit in the whole structure of the procedure for the conduct of a trial, as laid down in the Code, that only in special circumstances and by leave of the court will such a course be permitted; for otherwise there would be nothing to prevent the defence calling all over again, as defence witnesses, every one of the persons who had testified as Crown witnesses; which would be an absurd proposition. In certain circumstances, it is true, the defence may at the close of their case call as their witness, though in reality for the purpose of cross-examination, a Crown witness who has already testified; as for instance where for some reason the defence was prevented from being able adequately to cross-examine him when he testified for the Crown: such a case was *Sheoprasad Singh v. Rawlins* (5) (1901), 28 Cal. 594, where defence counsel had been absent from court on the day when the witness had testified for the Crown and the accused, being lay persons, were unable to cross-examine

him themselves adequately or at all. But in the present case there was no such circumstance calling for the adoption of any exceptional course in the interests of justice; for when Carson gave evidence for the Crown the appellant was represented by counsel, and if he wished to rely on Carson's allegedly contradictory statement to Brothers he could and should have first put it to Carson in cross-examination. If Carson had admitted making it and explained or attempted to explain it, that would have been an end of the matter; while if Carson had denied making it, Brothers could have been recalled, by leave of the court, which in such circumstances would without doubt have been granted, in order to testify that Carson did make it, and it would then have become part of the record.

Notwithstanding the learned trial magistrate's refusal to allow Brothers to be recalled at the close of the defence, or his omission to call Carson on his own motion, I have nevertheless thought it proper to have a look at the controversial statement in order to satisfy myself whether or not any failure of justice may have occurred through its not having been before the trial magistrate. Having looked at it, I am satisfied that no such failure could have occurred, and that there is no reasonable possibility that it would have caused him to entertain any reasonable doubt as to whether Carson was telling a true story in court. The discrepancy consists of this only; that where as in court Carson said that the appellant's original demand for £2,500 was made on November 23 and the reduced demand for Shs. 20,000/- was made on November 23 and was repeated on November 24, in one of the statements that he made to Brothers (a statement that bears no date) he said that the demand for £2,500 was made on November 23 and the reduced demand for Shs. 20,000/- was made on November 24, without saying that this latter demand had also been made on November 23. This was, it is true, a discrepancy; but it was one of dates and not of real substance. The substantial discrepancy lay between Carson's consistent statements that the appellant (on whatever exact date or dates) demanded Shs. 20,000/- as the price of his silence and of his restoration of the evidence he had collected, and the appellant's denial in evidence that he ever at any time made such a demand for such a purpose. The learned magistrate resolved that crucial conflict of evidence in favour of Carson; and it is unreasonable to suppose that he would have resolved it differently, or even been assailed with any reasonable doubt on the point, if the slight discrepancy as to dates had been before him.

For all these reasons I hold that the appellant was rightly convicted of demanding money with menaces; and I turn lastly to the question of sentence. The sentence imposed on the appellant (who was a first offender) was eighteen months' imprisonment. The learned magistrate, in imposing it, went carefully into all the factors relevant to sentence, and rightly observed that the offence of attempted blackmail is one which merits severe punishment; and this is none the less so from the circumstance (nearly always present in such an offence) that the facts which the accused has threatened to expose are themselves dishonest or shameful. In the circumstances I am unable to say that a sentence of eighteen months' imprisonment was manifestly excessive, or that in imposing it the learned magistrate took into account irrelevant factors or ignored any relevant ones. The sentence will accordingly stand.

For the foregoing reasons the appeal is dismissed.

Appeal dismissed.

For the appellants:

KA Master QC and RC Kesaria

For the respondent:

AM Troup (Crown counsel, Tanganyika)

For the appellant:

Advocates: *KA Master & Co*, Dar-es-Salaam

For the respondent:

The Attorney-General, Tanganyika

John Makindi v R
[1961] 1 EA 327 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 May 1961
Case Number:	31/1961
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes and Sir Owen Corrie Ag JA
Appeal from:	H.M. High Court of Tanganyika–Jefferies, Ag. J

[1] Criminal Law – Evidence – Admissibility – Criminal acts other than those charged – Death caused by severe beating – Defence that death was due to accident – Deceased an epileptic – Whether evidence of previous beatings admissible to rebut defence – Indian Evidence Act, 1872, s. 5, s. 7, s. 8, s. 14 and s. 15 – Indian Acts (Application) Ordinance (Cap. 2), s. 5, s. 14, s. 15 (T.).

Editor's Summary

The appellant appealed from his conviction and sentence for the manslaughter of a small boy, to whom he was in loco parentis, by beating him so severely that he died. The defence foreshadowed from statements made by the appellant to the police seemed to be that the deceased was an epileptic and that his injuries and death were due to an accident caused by epilepsy. When, at the trial, the prosecution sought to lead evidence of previous severe beatings of the deceased by the appellant in order to rebut this defence, the trial judge ruled that this evidence should not be admitted at that stage, but after hearing the appellant's unsworn statement, noted the nature of the defence and then admitted the evidence of previous beatings. It was considered on appeal whether this evidence should have been admitted.

Held –

- (i) for the admission of evidence of previous beatings by the appellant, it was not necessary for the trial judge to wait to ascertain what defence would be advanced by the appellant; the evidence, if it was admissible, was admissible in anticipation.
- (ii) the evidence was admissible under s. 7 of the Indian Evidence Act in explanation and substantiation of the cause of death and also under s. 8 and s. 14 as showing a motive in the appellant for revenge on the deceased and the appellant's ill will towards him.

- (iii) the fact that the evidence was admitted in rebuttal when it could have been admitted in anticipation did not cause any prejudice to the appellant.
- (iv) there was ample evidence to support the conviction and there was admissible evidence on which the trial judge could find (as he did) that the death of the deceased was the culmination of a series of brutal beatings over a period of months.

Appeal dismissed.

Cases referred to:

- (1) *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57.
- (2) *Maxwell v. Director of Public Prosecutions*, [1935] A.C. 309.
- (3) *Noor Mohamed v. R.*, [1949] A.C. 182.
- (4) *R. v. Straffen*, [1952] 2 All E.R. 657.
- (5) *Yafesi Kayima v. R.* (1951), 18 E.A.C.A. 288.
- (6) *Harris v. Director of Public Prosecutions*, [1952] A.C. 694; 1 [1952] All E.R. 1044.
- (7) *R. v. Hall*, [1952] 1 All E.R. 66.
- (8) *R. v. Chandor*, [1959] 1 All E.R. 702.
- (9) *Thompson v. R.*, [1918] A.C. 221.
- (10) *Kuruma s/o Kaniu v. R.* (1955), 22 E.A.C.A. 364 (P.C.).

Judgment

The following judgment, prepared by **Sir Kenneth O'Connor P:** was read by direction of the court: This was an appeal from the High Court of Tanganyika. The appellant was convicted on February 10, 1961, of the manslaughter of a boy of about ten to twelve years of age, by name Juma Chacha son of Muhoni, to whom the appellant stood in loco parentis. On April 11, 1961, we dismissed the appeal. We now give our reasons.

In brief, the relevant facts are that the appellant was a watchman at a garage named the Auto Garage in Mwanza. The boy, whose father was dead, lived with the appellant. One Petro (whom the learned judge considered to be a truthful witness) was a mechanic at the garage. He testified, *inter alia*, that on a day in September, 1960, about 6.00 p.m., he went to get money from his employer. Returning about 8.00 p.m. he heard the cry of a child crying twice: it was a cry as though someone had been hurt very badly: it came from the appellant's house. The witness recognized the sound as the voice of the child Juma who was staying with the appellant: the appellant was then inside his house: the witness could not hear any other voice. The next day when Petro reported for work at the garage, the appellant told him that the child had got a sudden illness and that he wanted to take him to hospital. The child was on the bed in the appellant's house and appeared to Petro to be dying. He had a wound on the head. He was removed in a motor vehicle to the hospital where he died later that day.

The medical evidence was to the effect that the child was suffering from cerebral haemorrhage. A post mortem examination revealed that he had an old bruise on the right side of the head and the right eye. He also had a fresh bruise on the back of the head and a collection of blood, a haematoma, under it. He had several scratches on the left side of the head, and old and new scratches on his back. The right side of the brain was covered with old and fresh blood clots which could have been caused by a blow on the head or a fall on the head on a hard surface. There was an old fracture of the arm which was still in plaster of paris. The cause of the death was cerebral haemorrhage. The medical officer explained that the fresh bruises indicated that there had been a fresh blow which caused fresh haemorrhage and that, acting on top of the old haemorrhages, was the immediate cause of death.

The prosecution put in evidence a statement made by the appellant to the police in which he said that he had returned home at 5.00 p.m. on September 1, and had found the deceased ill: the deceased told him that he had fallen down. The appellant then went to get some tablets for the boy who slept until 8.00 p.m. when a prisons askari named Nyankoba came: next morning he sent the boy to hospital. The prosecution also put in the statement made by the accused at the preliminary inquiry in which he said:

"Also about the schoolboys who are in school are they beaten severely or not?"

The defence foreshadowed seemed to be that the deceased was an epileptic and subject to fits and that his injuries had been caused by falls for which the appellant was not responsible. This was the defence ultimately relied on at the trial.

At the trial the Crown sought to adduce evidence of previous severe beatings of the deceased by the appellant in order to rebut a defence that the death of the deceased was due to accident caused by epilepsy. The evidence was objected to by counsel for the defence who said that the appellant was not going to raise a defence of accident or mistake or absence of intention: he was going to say that the deceased had been an epileptic, but he was not going to advance any

theory as to how or why the deceased met his death: the appellant did not know how the deceased met his death.

The learned judge ruled that the evidence of previous beatings should not be admitted at that stage; but said that he would consider an application to admit it in rebuttal, presumably if the nature of the defence, when disclosed, should justify such a course.

The appellant did not give evidence at the trial but made an unsworn statement to the effect on August 15, he had gone to Butimba and, on his return, had found that the child had been injured by falling off a motor vehicle where he had been playing: the child had been taken to hospital and his arm put in plaster: he was a sickly child who frequently fell down in epileptic fits. The appellant said that on September 1, the deceased had been all right, except that he still had his arm in plaster and had some old wounds. The appellant, so he said, had gone to the post office and, on returning about 5.00 p.m. had found the child lying on his bed complaining of a headache and giddiness: the child said that he had fallen down. The appellant went out and bought some tablets and remained at his house till about 8.00 p.m. when one Nyankoba came. The appellant and Nyankoba slept at the appellant's house with the child who was very ill. The child was taken to hospital next morning and died later in the day.

The learned judge then noted that the defence was that the child fell owing to epilepsy and that he had previous injuries due to similar fits. Upon this, he permitted the prosecution to lead evidence in rebuttal including evidence of previous beatings.

Petro was then recalled and testified that the deceased had been living with the appellant since May, 1960: he did not go to school, and the appellant was teaching him Kiswahili at home. The appellant, Petro said, used to beat the child and, on one occasion, broke the child's arm. The matter was reported to the police and the appellant was imprisoned: he (Petro) had been present when the appellant had told the boy "As you have made me to be imprisoned, I will beat you until you die". The appellant continued to beat the boy: he, the witness, had never seen the boy in an epileptic fit.

A Mr. Edmunds, an Inspector of Works in the East African Railways & Harbours organization who had an office close to the Mwanza Auto Garage, testified that he recalled an occasion when he was given certain information by the two Asian proprietors of the garage in connection with a little boy living with the appellant. This was in March or April and he, the witness, had got in touch with the police. After that he had seen the child on numerous occasions: he used to pass the place six times a day for five or six months and had never seen the child look normal: he perpetually had bruises and distorted features. The witness said that the boy himself had complained to him about the appellant: he had conveyed these complaints more than once to the police. Cross-examined, he said that he had never seen the appellant beat the deceased and had never spoken to the appellant about it: the deceased had never told him about any sickness that he had.

A court clerk at Mwanza testified that on July 2, 1960, the appellant had been charged with assaulting the deceased and had been put on probation for one year. The record of this case was put in and part of it was read to the assessors.

One J. B. Kanyigoto, a medical assistant at the Government Hospital, Mwanza, next gave evidence. He said that on June 25, 1960, he had examined a boy Juma Muhoni who was suffering from (1) bruising of the whole face; (2) haematoma of the left ear; (3) multiple grazes of the whole back; (4) a haematoma about three-quarters of an inch in diameter of the temporal region of the right side. The witness said that he thought that these injuries had been caused by beating. He again saw the boy on August 15: the boy

was brought by the appellant who said that he had fallen down. The witness examined the

boy and found that the injuries were caused by something like beating. The boy remained in hospital some time—on that occasion two or three days: the witness told the appellant to report to the police.

The learned acting judge was satisfied that the deceased had not been a sufferer from epilepsy, since neither Petro nor Edmunds had been told about that and it had not been reported to the medical assistant. He accepted the evidence that the boy was well at 5.00 p.m. on September 1, that he cried out at 8.00 p.m. at a time when the appellant would normally have been in the house, and that the boy was in a dying condition next morning. The appellant had admitted that he was in the boy's company from 5.00 p.m. except for a short period when he went to get the tablets. The learned judge had no doubt on the evidence that the appellant hit the boy on the head because he did not please him at his lessons and that this caused the cerebral haemorrhage which caused the boy's death. He found the appellant guilty.

There was evidence to support the conviction. None of the grounds of appeal set out in the memorandum of appeal had any substance. The sole point in the appeal was whether the learned judge was right in admitting evidence of previous beatings of the deceased by the appellant. The appellant did not appear at the hearing of the appeal, but this point was, at the request of the court, argued by Mr. Konstam who appeared for the Crown and who put the authorities for, as well as against, the appellant.

The principles which govern the admissibility of evidence of similar offences are well known. The leading authority is *Makin v. Attorney-General for New South Wales* (1), [1894] A.C. 57, where Lord Herschell at p. 65 enunciated two propositions. The first is:

“It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried”.

This principle is a deeply rooted and jealously guarded principle of the law of evidence as conceived in England: per Lord Sankey, L.C., in *Maxwell v. Director of Public Prosecutions* (2), [1935] A.C., 309, 317, cited with approval by the Privy Council in *Noor Mohamed v. R.* (3), [1949] A.C. 182, 190. See also *R. v. Straffen* (4), [1952] 2 All E.R. 657, at p. 659 where Slade, J., describes the principle as “an irrefragable rule”.

“It is of the utmost importance for a fair trial that the evidence should be *prima facie* limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined”:

Maxwell's case (2) at p. 320: *Noor Mohamed's* case (3) at p. 195. This principle is in full force in Tanganyika by virtue of s. 5(read with s. 14 and s. 15) of the Indian Evidence Act applied to the Territory by the Indian Acts (Application) Ordinance (Cap. 2 of the Laws of Tanganyika). See also *Yafesi Kayima v. R.* (5) (1951), 18 E.A.C.A. 288 where on similar sections in the Evidence Ordinance of Uganda the principle was held to apply in Uganda; and Woodroffe's Law of Evidence (9th Edn.) at p. 207, and Sarkar on Evidence (9th Edn.) at p. 132 to p. 137.

The Lord Chancellor in *Makin's* case (1) went on to enunciate a second proposition:

“On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it

be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.”

It seems that it may have been in intended application of this proposition that the learned acting judge in the present case refused to admit as evidence-in-chief the evidence concerning previous beatings, but admitted it in rebuttal of the defence of accident due to accident due to epilepsy when this defence was set up by the appellant. It was not, however, necessary to wait to ascertain what defence would be advanced. The evidence, if it was admissible at all, was admissible in anticipation. As Viscount Simon, L.C., said in *Harris v. Director of Public Prosecutions* (6), [1952] A.C. 694 at p. 706:

“I do not understand Lord Herschell’s words [in *Makin’s* case (1)] to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal”.

The learned judge’s refusal to admit the evidence in anticipation, while admitting it in rebuttal, may have been due to an initial misapprehension of what the defence was going to be. But, in any event, in our view, the second proposition in *Makin’s* case (1), had no application to the present case. Lord Goddard, C.J., in re-stating that proposition in *R. v. Hall* (7), [1952] 1 All E.R. 66 at p. 69 said:

“As soon as it becomes clear that the prisoner’s defence is that the facts alleged by the prosecution have an innocent, and not a guilty, complexion, evidence may be given which might otherwise be inadmissible, and it is not less admissible because it shows, or tends to show, that the prisoner has been guilty of another offence.”

It will be noted that the words are

“as soon as it becomes clear that the facts alleged by the prosecution have an innocent and not a guilty complexion”.

The principle applies when it is desired to rebut a defence that the facts alleged by the prosecution have an innocent complexion. But it is inapplicable to prove the main fact or transaction except in cases where the similar facts are part of or explanatory of the main transaction: Sarkar, p. 137; Woodroffe, p. 207. As Lord Parker, C.J., said in *R. v. Chandor* (8), [1959] 1 All E.R. 702, at p. 704:

“There are of course many cases in which evidence of a succession of incidents may properly be admissible to help to determine the truth of any one incident, for instance to provide identity, intent, guilty knowledge or to rebut a defence of innocent association. On such issues evidence of a succession of incidents may be very relevant, but we cannot say that they have any relevance to determine whether a particular incident ever occurred at all.”

It may be mentioned in passing that in England evidence of similar conduct by the accused on previous occasions may be adduced to rebut an alibi and to establish his identity on the occasion in question: *Thompson v. R.* (9), [1918] A.C. 221; *R. v. Chandor* (8). According to Sarkar at p. 132 and p. 137, this would not apply under the Indian Evidence Act. No question of identity, however, arises in the present case.

In the present case, the prosecution alleged that the death of the deceased had been caused by beatings administered by the appellant. Had the defence at the trial been that the appellant had beaten the deceased; but with an innocent intention e.g. as correction by one in loco parentis not intended to be excessive, then the second principle in *Makin’s* case (1), would have applied. Here, however,

the contest was not whether the appellant had beaten the deceased with an innocent intention; but whether the beatings which, according to the prosecution, caused the death of the boy ever took place at all. The appellant at the trial denied that he beat the child on September 2, and said that his injuries were due to a fall and “his frequent illness”. In such circumstances the second principle enunciated in *Makin’s* case (1), was inapplicable, and the question whether the evidence of previous beatings was admissible or not fell to be decided under the ordinary rules set out in the Indian Evidence Act.

The substance of the matter is that in Tanganyika, as in England:

“the prosecution may adduce all proper evidence which tends to prove the charge”;

Harris v. Director of Public Prosecutions (6), at p. 706, or, as s. 5 of the Indian Evidence Act puts it, evidence may be given of the existence or non-existence of every fact in issue, and of such other facts as are by the Act declared to be relevant, and of no others. It will be necessary now to examine briefly the evidence objected to and see whether it was admissible under the Indian Evidence Act. The main fact in issue was whether or not the appellant unlawfully killed the deceased on or about September 2, 1960, and one of the relevant facts was the cause of death. There was evidence, clearly admissible, from which the learned judge could and did infer that the appellant beat the boy at or about 8.00 p.m. on September 1. There was also evidence of previous beatings, involving a conviction of the appellant, which was objected to by the defence. Taking this evidence in chronological order, there was, first, the evidence of Kanyigoto the medical assistant at the Government hospital at Mwanza that on June 25, he had examined the deceased and found bruising over the whole of his face and haematoma of the left ear and right temporal region, which injuries the witness thought had been caused by beating. Since the cause of the boy’s death on September 2 was found to be a fresh blow or blows on the head (caused by a blow or a fall) acting on the top of old blood clots caused by previous haemorrhages, evidence which tended to explain the existence of the old blood clots was clearly admissible. It was admissible under s. 7 of the Indian Evidence Act in explanation and substantiation of the cause of death. We think that the evidence of Kanyigoto as to the further injuries treated by him on August 15, was also admissible on this head, as was the evidence of Edmunds as to the continuing injuries from which the child suffered over a period of five to six months.

The evidence of Petro, when recalled, as to the teaching of the deceased by the appellant was admissible under s. 7 to show the state of things obtaining between the appellant and the deceased.

Petro’s evidence as to the beating of the deceased and the breaking of his arm by the appellant in July resulting in the appellant being reported to the police, his conviction for maltreating the boy, and his threat: “As you have made me to be imprisoned I will beat you until you die” was clearly admissible under s. 8 and s. 14 of the Indian Evidence Act as showing a motive in the appellant for revenge on the deceased and the appellant’s ill will towards him. Admissible also, on the same ground, was the corroborating evidence of the court clerk proving the conviction of the appellant for assaulting the deceased, and the evidence of Edmunds that the boy had complained to him and that he had informed the police.

In our opinion, all the evidence of previous beatings and of the conviction of the appellant for a previous assault on the deceased was admissible under the Indian Evidence Act. The fact that it was admitted in rebuttal when it could have been admitted in anticipation did not cause any prejudice to the appellant.

Before leaving the case we should, perhaps, refer to the rule, not of law, but of judicial practice stated by Lord Du Parc in *Noor Mohamed's case* (3), at p. 192, cited by Viscount Simon, L.C., in *Harris v. Director of Public Prosecutions* (6), at p. 707, and mentioned in *Kuruma s/o Kaniu v. R.* (10) (1955), 22 E.A.C.A. 364 (P.C.). Lord Du Parc said:

“It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.”

We saw no reason to interfere in this case with the exercise of the learned judge's discretion in admitting evidence of previous beatings.

There was ample evidence to support the conviction and there was admissible evidence on which the learned judge could find (as he did) that the death of the deceased was the culmination of a serious of brutal beatings over a period of months. The sentence of 3½ years imposed was not, in the circumstances, excessive. We saw no reason for interfering with either the conviction or the sentence and, as already stated, we dismissed the appeal.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

MG Konstam (Crown Counsel, Tanganyika)

For the respondent:

The Attorney-General, Tanganyika

Mrs Feroz Begum Qureshi and another v Maganbhai Patel and others [1961] 1 EA 334 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	23 May 1961
Case Number:	16/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA
Appeal from:	H.M. Supreme Court of Kenya—Templeton, J

[1] *Rent restriction – Appeal – Jurisdiction – Statutory right of appeal from “determination” – Refusal*

of Rent Control Board to hold second review of past assessments – Whether refusal is a “determination” under Increase of Rent (Restriction) Ordinance, 1949, s. 7 – Increase of Rent (Restriction) Ordinance, 1949, s. 5 and s. 7 (K.)–Civil Procedure (Revised) Rules, 1948, O.XLIV, r. 7 (K.) – Increase of Rent (Restriction) (Amendment) Ordinance, 1953, s. 5 (1) and s. 34 (3) (K.) – Increase of Rent (Restriction) (Procedure and Fees) Regulations, 1957, r. 2 (K.).

Editor’s Summary

In December, 1952, the Central Rent Control Board assessed the standard rent of a building and in February, 1957, on the application of certain tenants reviewed that assessment. In July, 1958, the landlords applied for a review of the previous assessments. The board dismissed the application on the ground that under O. XLIV, r. 7, of the Civil Procedure (Revised) Rules, 1948, the board had no power to hear a second application for review. On appeal by the landlords to the Supreme Court the judge held that the decision of the board that O. XLIV, r. 7, applied and that by virtue of it, the board had no power to entertain a second review, was not a determination of any question under the Increase of Rent Restriction Ordinance, 1949, by a Rent Control Board, and that, accordingly, no appeal lay to the Supreme Court from the board’s decision. The landlords brought this further appeal in which the issue was whether an appeal lay to the Supreme Court.

Held –

- (i) the question before the board was whether a second review lay under s. 5 (1) (p) of the Increase of Rent Restriction Ordinance, 1949, or was prohibited under O. XLIV, r. 7, of the Civil Procedure Rules; that was a question of law arising under the Ordinance which the board had jurisdiction to determine under s. 5 (1) (n) of the Ordinance.
- (ii) the decision of the board that a second review was not competent amounted to an effective and conclusive determination of a question which was, under the Ordinance, to be determined by the board within s. 7; and accordingly an appeal from that determination lay to the Supreme Court.

Appeal allowed. Appeal from the board remitted to the Supreme Court for hearing.

Cases referred to:

- (1) *Sheikh Noordin Gulmohamed v. Sheikh Bros. Ltd.* (1951), 18 E.A.C.A. 42.
- (2) *Shanker Dass Mayer and Others v. Trustees of the Rahimtulla Lalji Hirji Charitable Trust* (1955), 22 E.A.C.A. 18.

May 23. The following judgments were read.

Judgment

Sir Kenneth O’Connor P: This is an appeal from a judgment and decree dated January 11, 1960, of the Supreme Court of Kenya given on appeal

from a decision of the Central Rent Control Board (hereinafter called “the board”). By that decision, dated November 24, 1958, the board dismissed an application made under s. 5 (1) (p) of the Increase of Rent Restriction Ordinance, 1949 (hereinafter called “the Ordinance”) for the board to review its assessment of the rent of premises situate in Ngara Road, Nairobi. The appellants are the landlords and the respondents the tenants of the premises.

The history of the matter was set out by the learned judge as follows:

“On December 17, 1952, the board assessed the standard rent for the whole building at Shs. 4,512/- per month, being 9½ per cent. per annum of the market cost of construction. On January 15, 1953, the board apportioned this rent between the various tenancies. On February 14, 1957, the then tenants of the first and second floors of the building applied to the board for a review of the assessment and after due inquiry the board held that the percentage of 9½ per cent. should stand but that 50 per cent. should be attributed to the ground floor and the remaining 50 per cent. apportioned between the first and second floors at 27 per cent. and 23 per cent. respectively.

“On July 3, 1958, the landlords applied for a review of the previous assessments, and on November 24, 1958, the board dismissed the application on the ground that under O. XLIV, r. 7, of the Civil Procedure (Revised) Rules, 1948, they had no power to entertain a second review.”

In taking this course the board followed two previous decisions of its own.

The learned judge held that the decision of the Rent Board that O. XLIV, r. 7, of the Civil Procedure Rules applied and that by virtue of it, they had no power to entertain a second review, was not a determination of any question under the Ordinance by a Rent Control Board and that accordingly no appeal lay to the Supreme Court from their decision not to proceed. The learned judge thought that the present case was indistinguishable from the case of *Sheikh Noordin Gulmohamed v. Sheikh Brothers Ltd.* (1) (1951), 18 E.A.C.A. 42.

The relevant provisions of the Ordinance, as amended by the Increase of Rent (Restriction) (Amendment) Ordinance No. 8 of 1953, are:

“Section 5. (1) The Central Board in its area . . . shall have power to do all things which it is required or empowered to do under the provisions of this Ordinance, and in particular shall have power

(a)

(b)

.....(c) to apportion payment of the rent of premises among the tenants sharing the occupation thereof;

.....

.....(n) to exercise jurisdiction in all civil matters and questions arising under this Ordinance;

.....

.....(p) at any time of its own motion, or for good cause shown on an application by the landlord or tenant, to reopen any proceeding in which it has given any decision, determined any question or made any order, and to revoke, vary or amend such question, determination or order.”

[There follow provisos to the effect that this power is not to prejudice the right of any person to appeal under s. 7 and prohibiting the exercise of this power while an appeal is pending.]

“Section 7. Except as hereinafter provided, where any question is, under the provisions of this Ordinance, to be determined by a Rent Control Board, the determination by such board shall be final and conclusive:

“Provided that an appeal from any such determination shall lie on any point of law, or of mixed fact and law, to the Supreme Court.”

Section 34 (3) empowers the Supreme Court to make rules prescribing the procedure to be followed in respect of any appeal to the Supreme Court from any decision or determination of the board. Under this power the Increase of Rent (Restriction) (Procedure and Fees) Regulations, 1957, were made, of which reg. 2 provides:

“2. The procedure of the Central Rent Control Board and the Coast Rent Control Board shall, so far as circumstances permit, be in accordance with the procedure prescribed, by the Civil Procedure (Revised) Rules, 1948, for matters relating to the procedure of civil courts.”

Order XLIV, r. 7, of the Civil Procedure Rules reads:

“7. No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.”

It will be observed that this rule, if applicable, would restrict the apparently unrestricted power, expressly granted to the board by s. 5(1) (p) of the Ordinance, at any time to re-open any proceedings in which it has given any decision, determined any question, or made any order, and to revoke, vary or amend such decision, determination or order. It is arguable that since circumstances affecting rents may easily change more than once, and may easily entail more than one review, it could not have been the intention of the rule-making authority by applying generally rules of civil procedure so far as circumstances permit, to curtail an express and special provision of the Rent Restriction legislation and that O. XLIV, r. 7, is ineffectual to restrict the apparently unrestricted provisions of s. 5(1) (p) of the Ordinance. Some of the rules relating to reviews by a judge could not be applied to reviews by the board. Whether, in view of s. 5 (1) (p) of the Ordinance, r. 7, applied, was the question which was before the board. Mr. Sampson, for the respondents, said that they did not decide it; the board did not consider s. 5(1) (p). It is not, however, to be assumed that the board ignored the relevant provision of the Ordinance under which it was constituted and under which alone it had any power to review its previous decisions. By deciding that it could not entertain a review of a decision reached on a previous review because of O. XLIV, r. 7, the board decided by necessary implication that that rule restricted the provisions of s. 5 (1) (p) to a single variation of a previous order. It is not for this court at this stage to consider whether or not the decision of the board was right. The only question before us now is whether an appeal lay to the Supreme Court.

In *Sheikh Noordin Gulmohamed v. Sheikh Bros. Ltd.* (1), the landlord of certain premises applied to the Central Rent Control Board for an order for recovery of possession. The board commenced hearing the application, but declined to proceed further on the ground that the proceedings (which would have involved a protracted checking of accounts between the parties) were a misuse of the board's functions. The landlord appealed to the Supreme Court under s. 7 of the Ordinance. The Supreme Court dismissed the appeal on the ground that no appeal lay, as the decision of the board was not a “determination” within the meaning of s. 7 of the Ordinance.

On appeal to this court it was held: (1) that the appeal to the Supreme Court was not final and that a further appeal lay to this court; (2) that, there being no “determination” by the board, no appeal to the Supreme Court lay under s. 7 of the Ordinance.

Lockhart-Smith, J.A., said at p. 49:

“It is not disputed that the premises in issue are premises to which the Ordinance applies and are within the area of the Central Board, and it is obvious that the application was a ‘claim or other proceeding arising under this Ordinance. The Central Board has had power ‘specifically conferred’ upon it to make the order applied for in the application and is, therefore, as this court has already decided, the only tribunal having jurisdiction to grant the remedy which the present appellant seeks. The board, in refusing to hear and determine the appellant’s application, has declined to exercise the exclusive jurisdiction which the legislature has conferred upon it, and which the appellant has the right to invoke. Speaking for myself, I cannot see how, in these circumstances, proceedings by way of prerogative writ to compel the board to hear and determine the application could fail to succeed.

“At the same time, I have every sympathy with the attitude of the board in this case. It does indeed seem most inappropriate that such a tribunal should be required to deal with such cases as the present, which, in my opinion, ought clearly to be a matter for the courts. But the legislature has seen fit to decree otherwise, and there is no more to be said.”

The president, Sir Barclay Nihill, concurred.

Thacker, Acting Chief Justice, Kenya, said:

“The question or questions which were before the board were not as I see it determined by them. No decision or determination was given. The board contented itself by saying that it considered that it was not the proper tribunal before which the particular dispute should be brought.

“As I see it, there was not a determination by the board of the question or questions before it.”

In *Shankerdass Mayer and Others v. Trustees of the Rahimtulla Lalji Hirji Charitable Trust* (2) (1955), 22 E.A.C.A. 18, the *Sheikh Noordin Gulmohamed* case (1), was considered. Shankerdass, on an appeal from the Central Rent Control Board to the Supreme Court, had successfully taken the point that the appeal was incompetent as there had been no determination by the board. The judge considered that *Sheikh Noordin’s* case (1), was authority for the proposition that a decision which is not enforceable by execution or otherwise is not a “determination” within s. 7 of the Ordinance. He dismissed the appeal and, doubting whether there had been an “event” and because the preliminary objection was purely technical, ordered each party to pay its own costs. It was held by this court on appeal: (1) that there was an “event”, viz. the judge’s decision that the appeal was incompetent which was an effective and conclusive determination of the question before him; (2) that the decision to deprive the successful party of costs was wrong; and (3) that *Sheikh Noordin’s* case (1), did not establish that there could be no “determination” of a triable issue by a court or statutory tribunal unless, as a result, a party is left with something capable of positive enforcement.

Sir Barclay Nihill (President) said at p. 20:

“The question before the learned judge on the preliminary objection was whether an appeal lay and his decision that it did not, amounted, I should have thought, to an effective and conclusive determination of the question before him.”

I respectfully agree.

The question before the board in the present case was whether (there having been a previous review) a review lay under s. 5 (1) (p) of the Ordinance or was

prohibited by O. XLIV, r. 7, of the Civil Procedure Rules, applied by a rule made under the Ordinance. I think that that was a question of law arising under the Ordinance which the board had jurisdiction to determine under s. 5 (1) (n); and that the decision of the board that a second review was not competent amounted to an effective and conclusive determination of the question before it.

The part of *Gulmohamed's* case (1), which is in point in the present case was decided on very special facts and should be confined to the facts of that case.

In my view, in the present case, the decision of the board was clearly a “determination” of a question which was, under the Ordinance, to be determined by a Rent Control Board within s. 7, and an appeal from that determination lay to the Supreme Court.

I would allow the present appeal with costs. The appellant should have the costs of the preliminary objection in the Supreme Court, and the appeal from the determination of the board should be remitted to the Supreme Court to be heard.

Sir Alastair Forbes V-P: I agree and have nothing to add.

Gould JA: I also agree.

Appeal allowed. Appeal from the board remitted to the Supreme Court for hearing.

For the appellants:

RN Khanna

For the respondents:

R Sampson

For the appellants:

Advocates: *DN & RN Khanna*, Nairobi

For the respondents:

Sampson & Ransley, Nairobi

Re an Application by Anne Nicholson [1961] 1 EA 339 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	13 May 1961
Case Number:	16/1961
Before:	Biron Ag J

[1] *Inquest – Certiorari – Court’s jurisdiction to quash verdict – Verdict of suicide – Whether power to*

quash verdict implies power to order that inquest be reopened – Inquests Ordinance (Cap. 24), s. 28 (T.) – Coroners Act, 1887, s. 6.

Editor's Summary

A magistrate held an inquest at Mbeya, Tanganyika, on the body of a man who had died of a shotgun wound. Within eighteen hours of the death of the deceased the magistrate brought in a verdict of suicide whilst the balance of his mind was disturbed. The widow of the deceased requested the attorney-general to apply to the court pursuant to s. 28 (1) (b) of the Inquests Ordinance for an order to reopen the inquest and, when he refused, applied *ex parte* for a writ of certiorari to quash the verdict on the grounds that the inquest was heard with undue haste, that there was insufficient investigation of the circumstances leading to the death and that further evidence was available.

Held –

- (i) despite the provisions of s. 28 of the Inquests Ordinance the High Court of Tanganyika retains its common law power to quash the verdict of an inquest in proceedings for certiorari.
- (ii) if the court has inherent power to quash a verdict it must also have the power to order an inquest to be reopened, irrespective of s. 28 *ibid*.
- (iii) since the deceased's widow obviously considered that justice had not been done in the absence of the additional evidence available, and as justice must manifestly be seen to be done, this was a proper case for directing that the inquest be reopened for taking additional evidence.

Order accordingly.

No cases referred to in judgment

Judgment

Biron Ag J: This is an application brought by the widow of John Nicholson, deceased,

“for the issue of a writ of certiorari (so the application reads) to remove into this honourable court and quash the verdict and inquisition of the coroner in the above-numbered inquest on the grounds set out in the annexed statement, affidavits and memorial”.

The verdict in the inquest in respect of which the writ is sought (it is short and can be quoted in full) reads:

“Here the evidence leaves me in no doubt but that deceased deliberately took his life. I have carefully considered the possibility of this tragic affair being an accident but the evidence of Mr. Malipula and the doctor make it clear that an accident must be ruled out.

“Here there has been a tragic set of circumstances culminating in the death of this young man. No doubt the effects of too much of drink on an empty stomach, coupled with shock from accident and the loss of his car had proved too much for deceased's mental stability. It would also seem there was something contentious between him and his superior. This may also have added to tip the scales which caused him to take his life.

Accordingly I say my verdict is suicide whilst the balance of his mind was disturbed.”

The grounds upon which relief is sought are set out in the statement as:

“The grounds upon which the said relief is sought are that the inquest was opened and heard with undue haste, there was no proper investigation into the facts leading up to and surrounding the death, and the coroner conducted the inquest cursorily and superficially, and reached an erroneous verdict on the evidence which was or should have been before him. The grounds are more fully set out in the memorial of the said Anne Nicholson annexed hereto.”

The grounds as amplified in the memorial are that:

-
- “2. On November 17, 1960, the coroner at Mbeya, A.P. Mitchell, Esq., resident magistrate, in Mbeya Inquest No. 35 of 1960, on the body of the deceased John Nicholson, brought in a verdict that the deceased had committed suicide while the balance of his mind was disturbed. This verdict was unsatisfactory for the reasons set out hereunder.
 - “3. The inquest was opened and heard with undue haste, the verdict being recorded within eighteen hours of the time of death. There was no proper investigation by the authorities into the facts leading up to and surrounding the death.
 - “4. The police authorities could not and did not in the circumstances thoroughly sift the evidence in order to discover the true facts of the case. In particular the police were under the impression that the deceased had bought or otherwise obtained a certain amount of shotgun ammunition in Mbeya. This was in fact not the case, as he had taken an unspecified number of rounds from Njombe earlier on the same day.
 - “5. The deceased was notoriously careless in the handling of firearms, and frequently travelled in his car with his shotgun loaded. After the death of the deceased a loaded pistol was found in the deceased’s house. All this points to the possibility of the shooting having been accidental, a possibility which the coroner did not adequately consider. The gun itself did not belong to the deceased but was borrowed from one Major Harris, and was peculiar in that it had no trigger guard, and it was therefore comparatively easy for the trigger to be pulled accidentally. The gun was damaged in the accident, and could have been fired accidentally while the deceased was attempting to assess the damage.
 - “6. The deceased was not a man who was likely to take his own life. He was a man of cheerful disposition, was devoted to myself and our two children, and was of a cheerful and ‘happy-go-lucky’ temperament. He was not in debt, had just finished paying for the new car, and had sufficient funds to pay off an outstanding tradesman’s bill of about £170. The statement reported by Mr. Malipula, to the effect that if the gun had not been damaged he would have shot himself, was not intended seriously.
 - “7. The verdict of suicide has caused great grief to myself and to the deceased’s family and if at any time it becomes known to our children will be a grave shock to them. If it were proved beyond doubt then it would have to be accepted, but I do not believe it, and I say that the inquest was cursorily and superficially conducted and if all the evidence is heard and weighed a verdict of accidental death will be reached.”

Section 28 of the Inquests Ordinance (Cap. 24) reads:

- “28. (1) Where the High Court, upon application made by or under the authority of the attorney-general is satisfied that it is necessary or desirable to do so, it may:
- (a) order an inquest to be held touching the death of any person;
 - (b) direct any inquest to be reopened for the taking of further evidence, or for the inclusion in the proceedings thereof and consideration with the evidence, already taken, of any evidence taken in any judicial proceeding which may be relevant to any issue determinable at such inquest, and the recording of a fresh verdict upon the proceedings as a whole;
 - (c) quash the verdict in any inquest substituting therefore some other verdict which appears to be lawful and in accordance with the evidence recorded or included as hereinbefore in this section provided; or
 - (d) quash any inquest, with or without ordering a new inquest to be held.
- “(2) The provisions of this section shall apply to all inquests and the verdicts therein.
- “(3) For the purpose of this section the expression ‘judicial proceeding’ means a proceeding before any court, tribunal or person having by law power to hear, receive and examine evidence on oath.”

The widow applied to the attorney-general requesting him (so runs the affidavit of learned counsel):

“Acting under the provisions of s. 28 (1) (b) of the Inquests Ordinance, Cap. 24, I applied to the attorney-general by letter dated January 5, 1961, requesting him to make, or to authorise my firm to make, an application to this court under that section for the reopening of the inquest, the taking of further evidence, and the recording of a fresh verdict upon the proceedings as a whole.

“By letter dated January 9, 1961, the attorney-general declined to act as requested.

“On April 5, 1961, I sent to the attorney-general a copy of the memorial of Anne Nicholson, which is annexed to the statement in this matter, with a request that he should reconsider his previous decision. By letter dated April 10, 1961, the attorney-general stated that he was not prepared to alter his previous decision.”

It is to my mind abundantly clear from the authorities that, despite the provisions of s. 28 of the Inquests Ordinance expressly conferring powers on the court “upon application made, or on the authority of the attorney-general”, the court has retained its common law power of quashing the verdict of an inquest through the procedure of certiorari initiated by any person aggrieved, as, in this case, the widow. As stated in Halsbury’s Laws of England (3rd Edn.) Vol. 8, p. 529:

“The common law jurisdiction of the Queen’s Bench Division of the High Court to quash an inquisition is untouched by the statutory power to quash conferred upon the High Court by the Coroners Act, 1887.”

The authorities on which this statement of the law is based are cited in Halsbury, and I do not consider it necessary to recite them. The relevant section of the Coroners Act is s. 6, which reads:

“6.(1) Where Her Majesty’s High Court, upon application made by or under the authority of the attorney-general, is satisfied either:

- (a) that a coroner refuses or neglects to hold an inquest which ought to be held; or
- (b) where an inquest has been held by a coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held,

the court may order an inquest to be held touching the said death, and may, if the court think it just, order the said coroner to pay such costs of and incidental to the application as to the court may seem just, and where an inquest has been already held may quash the inquisition on that inquest.

“(2) The court may order that such inquest shall be held either by the said coroner, or if the said coroner is a coroner for a county, by any other coroner for the county, or if he is a coroner of a borough or for a franchise then by a coroner for the county in which such borough or franchise is situate, or for a county to which it adjoins, and the coroner ordered to hold the inquest shall for that purpose have the same powers and jurisdiction as, and be deemed to be, the said coroner.

“(3) Upon any such inquest, if the case be one of death, it shall not be necessary, unless the court otherwise order, to view the body, but save as aforesaid the inquest shall be held in like manner in all respects as any other inquest under this Act.

“(4) Any power vested by this section in Her Majesty’s High Court may, subject to any rules of court, made in pursuance of the Supreme Court of Judicature Act, 1875, and the Acts amending the same, be exercised by any judge of that court.”

The powers vested in the court by the section are thus exercisable “upon application made by or under the authority of the attorney-general”. This provision relating to the attorney-general corresponds to the similar provision in s. 28 of the Inquests Ordinance. In fact, the wording is exactly the same:

“Where the High Court, upon application made by or under the authority of the attorney-general”

and no doubt the section in the Ordinance is modelled on the corresponding section in the Act.

Thus, just as in England the court has retained its common law or inherent powers independently of the Act, likewise here the court has retained its common law or inherent powers independently of the Ordinance.

The only aspect which has occasioned me any difficulty in so far as the law is concerned, is whether the court has all the powers expressly set out in s. 28 of the Inquests Ordinance in proceedings in certiorari. I have been unable to find any express authority to the point. But on the application of first principles, which I must concede I only apply as a last resort, on the principle that the lesser is included in the greater, or even on the a fortiori principle, if the court has inherent power to quash a verdict, surely it must have the power to order an inquest to be reopened and fresh evidence taken, as provided in sub-s. (b) of s. 28 of the Inquests Ordinance.

In this instant case, the widow has submitted that fresh evidence which could affect the verdict is now available, and affidavits to that effect have been filed.

In the circumstances, in view of the seriousness of the matter—suicide is a felony—and the distress and pain caused to the family of the deceased, and also on the principle that not only must justice be done but it must manifestly be seen to be done—in this case, the widow obviously feels that justice has not been done in the absence from the proceedings of this additional evidence—I consider that this is a proper case for directing that the inquest be reopened for the taking of the additional evidence.

In view of the course I propose to take, it would not be proper for me to comment on the proceedings or the verdict, but one allegation apparently criticising the coroner must not be left unanswered. That is, that

“The inquest was opened and heard with undue haste, the verdict being recorded within eighteen hours of the time of death”

and “The coroner conducted the inquest cursorily and superficially”. On my perusal of the proceedings there is nothing to substantiate such allegation. It is true that the inquest was held very soon after the death, but that in itself is no cause for complaint. In fact, it is commendable, as expressly enjoined by s. 4 of the Ordinance that “the coroner shall hold an inquest on such body as soon as practicable”.

For the reasons above set out, in the terms of s. 28 (b) of the Inquests Ordinance, I direct that the inquest be reopened for the taking of further evidence and for the recording of a fresh verdict upon the proceedings as a whole.

Order accordingly.

For the applicant:

RS Thornton

For the applicant:

Advocates: *Fraser Murray, Thornton & Co, Dar-es-Salaam*

Gajender Pal and another v Ram Bilas Sirdaw [1961] 1 EA 344 (HCU)

Division: HM High Court of Uganda

Date of judgment: 7 June 1961

Case Number: 216/1961

Before: Sheridan J

[1] Practice – Parties – Substitution of defendants – Application to substitute legal representative of deceased defendant – Court requested to order substitution of executors – Joint request of plaintiff and executors – No order made or extracted – Subsequent proceedings on basis that order duly made – Whether proceedings null and void – Civil Procedure Rules, O. 21, r. 4 and r. 12(U.) – Rules of the Supreme Court, O. XVII, r. 4 – Indian Code of Civil Procedure, 1908, O. 22, r. 3 – Civil Procedure

Ordinance (Cap. 6), s. 72 and s. 161(U.).

Editor's Summary

In 1958 the defendant R.B.S. sued one, H.R., who subsequently died. In April, 1960, R.B.S. moved the court to join the first plaintiff as a party to the proceedings begun in 1958 as the son and legal personal representative of the deceased. The application was adjourned as defective since the deceased had appointed two executives, namely his son and widow, and by a letter written in June, 1960, to the registrar and signed by the advocates for R.B.S. and the executors, they requested that a consent order be made substituting the names of the executors in the proceedings for that of the deceased H.R. The registrar simply recorded the filing of the letter of consent and made no order thereon. In September, 1960, the hearing was resumed and on the basis that the executors had been duly impleaded, judgment was entered for R.B.S. and a decree was later extracted. The executors then sought to appeal and their advocate having discovered that no order had been made on the letter of consent tried to have the proceedings subsequent to H.R.'s death set aside by consent but R.B.S. would not agree. The executors then sued for declarations that the proceedings, judgment and decree were null and void, that the suit had abated and for the judgment and decree to be set aside. R.B.S. defended claiming that he had done all that was necessary and that the plaintiff executors were not entitled to question the proceedings to which they were active and consenting parties.

Held –

- (i) since O. 21, r. 4, places the duty upon the court to implead the legal representatives when application is made, the parties should not be penalised for any shortcomings in carrying out the ministerial function of the court.
- (ii) the claim of the plaintiffs was founded upon an immaterial irregularity and a technicality, it would not be just to grant the declarations sought.

Suit dismissed.

Cases referred to:

- (1) *Farrab Incorporated v. The Official Receiver and Provisional Liquidator*, [1959] E.A. 5 (C.A.).
- (2) *Iron and Steelwares Ltd. v. C. W. Martyr & Co.* (1956), 23 E.A.C.A. 175.

Judgment

Sheridan J: The two plaintiffs, as executors of Haveli Ram (deceased)—they are his son and widow respectively—claim (a) a declaration that all proceedings in H.C.C.C. No. 542 of 1958, in which Haveli Ram was the defendant and the present defendant was the plaintiff, subsequent to the death of the deceased on October 19, 1959, including the judgment and decree

thereon, are null and void; (b) a declaration that the said suit against the deceased has abated; (c) an order that the judgment and decree in the said suit be set aside and that the present defendant pay to the plaintiffs the costs of the said suit subsequent to October 19, 1959.

The defendant relies on an application dated April 13, 1960 (exhibit "A") made by Mr. Vyas, his advocate, that the first plaintiff be made a party to the suit as the deceased's legal representative. Despite the somewhat ambiguous typed cancellation at the top left-hand corner it appears from the body of the application that it was correctly made by notice of motion in accordance with the Civil Procedure Rules, O. 21, r. 12. The procedure to be followed in case of the death of a defendant is set out in O. 21, r. 4:

"4.(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

.....

"(3) Where within the time limited by law no application is made under sub-r. (1), the suit shall abate as against the deceased defendant."

Mr. Russell for the plaintiffs has made the point that the application is addressed only to the first plaintiff—I am informed that the second plaintiff is an elderly illiterate lady—and that it was made prior to the first plaintiff taking out probate of the deceased's will. There is no evidence one way or another whether this was so.

The application was due to be heard on April 20. On that date Mr. Vyas and Mr. Korde (D.W. 1), who had been acting for the deceased, and who has since acted for the plaintiffs with their full consent, attended before Mr. Sequeira (D.W. 2), the deputy registrar. It was then realised that the application was defective as there were two executors. The application was adjourned sine die after it had been agreed that the two plaintiffs should be brought on the record in substitution for the deceased. By a letter dated June 9, 1960 (exhibit "B") signed by Mr. Vyas and Mr. Korde addressed to the registrar, they requested the following consent order to be made:

"That the names of Satvanti Savan Mal widow of Haveli Ram and Gajender Pal son of Haveli Ram who have been granted the probate of the estate of the deceased defendant be substituted for the deceased defendant in the above matter and the cost of the application be costs in the cause."

On June 15, 1960, an entry was made on the case file "Consent filed. Re substitution of defendant", and it was signed by Mr. Sequeira. A receipt for Shs. 6/- (exhibit "H") was issued for filing the consent. Mr. Sequeira was following the usual practise in the case of consent orders. According to him it is up to the advocate to extract a formal order in the event of an appeal. He concedes that the entry on the file is not an order as defined by the Civil Procedure Ordinance, s. 2, in that it is not the formal expression of any decision of a civil court.

On September 30, 1960, the hearing was resumed before Lyon, J., and it proceeded on the basis and in the general belief that the executors had been duly impleaded. On November 18 judgment was entered in favour of the plaintiff (present defendant) for Shs. 34,448/52 with interest and costs and a decree was extracted (certified copy is annexure "A" to the plaint). The plaintiffs instructed Mr. Korde to appeal. From an affidavit sworn by the first plaintiff

on February 3, 1961 (exhibit “D”) it emerges that the plaintiffs were seeking a stay of execution. It was then discovered that no order had been extracted in compliance with O. 21, r. 4, and by letter dated February 21, 1961 (annexure “B”) from Mr. Korde to Mr. Gautama, the defendant’s advocate, the position as the plaintiffs now see it was set out. Mr. Korde sought the defendant’s agreement to the setting aside of the proceedings subsequent to the deceased’s death without prejudice to the defendant’s right to move the court for the requisite orders to enable him to proceed with the suit. The defendant declined the offer. In his written statement of defence he maintains that he had done all that was required of him when his advocate made the application (exhibit “A”) and signed the consent letter (exhibit “B”). Further, he avers that the plaintiffs are now debarred from questioning the validity of proceedings to which they were active and consenting parties.

Mr. Russell relies on the wording of O. 21, r. 4 (1). He submits that the extraction of a formal order is mandatory; that this is something which goes to the root of the matter and that in the absence of any such order the suit has abated under O. 21, r. 4 (3). This sub-rule provides that where no application is made under sub-r. (1) within the time limit fixed by law then the suit shall abate as against the deceased defendant. No one has told me what the time limit is in this case but it is fair to assume that it has not yet elapsed and that an order could still be made if its absence would otherwise be fatal to the continuance of the suit.

In *Farrab Incorporated v. The Official Receiver and Provisional Liquidator* (1), [1959] E.A. 5 (C.A.) the Court of Appeal adverted to the dire consequences which can ensue on failure to extract a formal order. In answer to this I think that Mr. Gautama has made a valid point that a distinction must be drawn between an appeal against a final decree or order—an appeal being the creature of statute and not lying as of right—and an interlocutory order such as should have been extracted in the present case. An appeal lies only from a decree or order but one may well ask what is the purpose or need for a formal order here, especially in view of the letter of consent (exhibit “B”). The Rules of the Supreme Court, O. XVII, r. 4, which is couched in wider terms than our O. 21, r. 4 (1), would seem to favour the plaintiffs’ contention because a note in the Annual Practise, 1958, at p. 418, reads:

“Death of sole defendant. If the cause of action survives against the personal representatives, the latter must be added by leave, otherwise the action cannot be continued.”

Still I am not certain that on the facts of this case, with the proceedings and consent letter in mind, the plaintiffs would necessarily succeed in an action in the Royal Courts of Justice in the Strand. Be that as it may, and whether we like it or not, in Uganda we are firmly wedded to the Indian Civil Procedure Code. Order 21, r. 4, derives from the Indian O. 22, r. 3. This is the commentary on the words

“shall cause the legal representative of the deceased plaintiff to be made a party”

in Chitaly and Rao (6th Edn.) Vol. 3, at p. 3362:

“Shall cause the legal representative of the deceased plaintiff to be made a party. The court is bound to implead the legal representatives as parties on an application made in that behalf, unless there is a dispute as to who is the legal representative, in which case, the question should be decided by it under r. 5. Under the rule all that the person desirous of proceeding with the case has to do is to make an application. The further acts are left to the court. Where no order is passed by the court and the applicant also

does not press the need for a formal order, the omission on his part will not take away his right to proceed with the case as there is no duty cast on him by the rule to remind the court.”

The same considerations apply to a deceased defendant. It is sufficient for the application to be made. Thereafter the duty to implead the legal representatives is thrown on the court and the parties are not to be penalised for any short-comings in the carrying into effect by the court of this ministerial function. It was the omission of the court which placed both parties in a disadvantageous position and the courts in India have been ready to use their inherent jurisdiction to correct such a mistake. The Civil Procedure Ordinance, s. 161, saves the inherent powers of the court. Mr. Gautama also prayed in aid s. 72, which provides that no decree shall be reversed or modified for error or irregularity not affecting the merits or jurisdiction. That section is concerned with appeals, but he asks me to use it as a guide in considering the present claim. He cited to me a mass of authorities dealing with analogous provisions to show that the courts will draw a distinction between a material irregularity and an immaterial irregularity such as in this case. In answer to Mr. Russell’s complaint that he has taken no steps to cure the defect he answers with some force that if the irregularity is material it would be futile to ask the court to rectify it and that if it is immaterial it does not matter.

I must confess that I find the plaintiffs’ claim very technical. If I acceded to it I would be keeping one or other of the parties much further away from the fruits of any decree which is eventually upheld. As was observed in *Iron and Steelwares Ltd. v. C. W. Martyr & Co.* (2) (1956), 23 E.A.C.A. 175–

“Procedural rules are intended to serve as the handmaiden of justice, not to defeat it.”

For the above reasons I find that the plaintiffs are not entitled to the declarations and order which they seek. The suit is dismissed with costs.

Suit dismissed.

For the plaintiffs:

REG Russell and KG Korde

For the defendant:

SC Gautama

For the plaintiffs:

Advocates: *KG Korde*, Kampala

For the defendant:

SC Gautama, Nairobi

The Attorney-General v Kathenge Njoroge
[1961] 1 EA 348 (SCK)

Division: HM Supreme Court of Kenya at Nairobi

Date of judgment: 30 June 1961

Case Number: 642/1961

Before:

Sir Ronald Sinclair CJ and Pelly Murphy J

[1] *Criminal law – Public order – Breach of curfew order – Interpretation of order – Public Order Ordinance, 1950, s. 10 (1) and s. 16 (K.) – Public Order (Amendment) Ordinance, 1960 (K.).*

[2] *Constitutional law – Statute – Statute authorising discriminatory orders to be made – Whether statute is ultra vires the constitution – Kenya (Constitution) Order – in – Council 1958, s. 3 (2) and s. 58 – Kenya Royal Instructions, 1958, cl. 5 (K.).*

Editor's Summary

The respondent was charged with contravening the provisions of a curfew order issued under s. 10 (1) of the Public Order Ordinance, 1950, as amended by Public Order (Amendment) Ordinance, 1960. The curfew order provided that in the area specified and between 7 p.m. and 6 a.m. "every African shall", except in accordance with the terms of a written permit granted by an authorised officer, "remain indoors in the premises in which he normally resides". The magistrate held that the words "shall remain" connoted a state of continuity, that since the respondent had not been in the premises in which he normally resided at or since 7 p.m. on the day of his arrest, that state of continuity had never commenced, that accordingly there had not been a breach of the order and the respondent must be acquitted. On a case stated at the instance of the Attorney-General it was submitted that according to the construction put upon the expression "shall remain" by the magistrate the offence was committed on the facts as found. The magistrate observed obiter that the Ordinance, or, alternatively the curfew order was ultra vires.

Held –

- (1) the curfew order and the Public Order Ordinance, 1950, as amended, require a state of continuity between the hours of 7 p.m. and 6 a.m.; the curfew order applies not only to persons who are indoors at 7 p.m. but to those who are not so.
- (ii) the magistrate's construction of the words "shall remain indoors" would make Part IV of the Ordinance completely nugatory.
- (iii) the curfew order was racially discriminatory but s. 10(1) of the Ordinance specifically allows discrimination, and therefore the curfew order was not ultra vires the Ordinance or the constitution.
- (iv) in view of the proviso to s. 3 (2) of the Kenya (Constitution) Order-in-Council, 1958, no court can inquire whether the Governor has complied with Her Majesty's instructions; since the Governor had given his assent to the Ordinance the magistrate was bound in law to assume that the Ordinance was valid and intra vires.

Acquittal set aside. Case remitted to the magistrate with a direction to enter a conviction and to make consequential orders.

No cases referred to in judgment

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: This is a case stated by the resident magistrate, Nakuru, at the instance of the Attorney-General in respect of the following charge:

“Contravening the provisions of a curfew order contrary to s. 10 (6) of the Public Order (Amendment) Ordinance, 1960, as read with the Public Order Ordinance, 1950.,

Particulars of Offence

“Kathege s/o Njoroge on the 14th day of May, 1961, at approximately 7.15 p.m. being an African and not being a person authorised by a written permit granted by a district officer, a police officer of or above the rank of inspector grade 1 or a forester, failed to remain indoors in the premises in which you normally reside, between the hours of 7 p.m. and 6 a.m.”

We would state here our view that it was incorrect to quote the offence as a contravention of the amending Ordinance. The law is contained in s. 10 (6) of the 1950 Ordinance as amended by the 1960 Ordinance. As to this, see s. 15 (2) of the Interpretation and General Clauses Ordinance, 1956.

The curfew order in question was in the following terms:

“Public Order Ordinance, 1960. Curfew order. Whereas, I, John Arnold Harrop Wolff, Provincial Commissioner, Rift Valley Province, consider it necessary in the interests of public order so to do, I hereby make the following order:

“In exercise of the powers conferred upon me by sub-s. (1) of s. 10 of the Public Order Ordinance, 1950, as amended by Ordinance No. 53 of 1960, I direct that within the area specified in the Schedule hereto and between the hours of 7 p.m. and 6 a.m. every African shall, except under and in accordance with the terms of a written permit granted by a district officer, a police officer of, or above the rank of inspector, grade 1, or a forester, remain indoors in the premises in which he normally resides.

Schedule

- “1. The whole of the Njoro Ward of the County of Nakuru, including the East Mau Forest and the Nakuru Lake Forest, but excluding the main Nakuru/Eldoret trunk road and that part of the ward lying to the north of it.
- “2. The whole of the Elburgon/Turi Ward of the County of Nakuru.

J.A.H. Wolff

Provincial Commissioner, Rift Valley Province.

Dated the 14th day of May, 1961.”

The facts as found by the magistrate were as follows:

- “1. The accused, an African, was arrested within the area set out in the schedule to the curfew order at 7.15 p.m. on May 14, 1961.
- “2. The accused was arrested outside the premises where he normally resides and had not been in those premises at or since the hour of 7 p.m. on May 14, 1961.
- “3. The accused was not exempted under a permit from the provisions of the order.”

The magistrate found that the words “shall remain” connoted a state of continuity and that if such a state had never commenced there could be no breach of it. This finding is challenged by the Crown.

Counsel for the Crown concedes that the construction of the expression “shall remain” put upon it by the magistrate is correct—that the words do

connote a state of continuity—but that, on that construction, the offence was committed on the facts as found. Counsel contends, and we agree with him, that the flaw in the magistrate’s reasoning is to be found when in his judgment he goes on to say:

“The point for determination is that the court has indicated that failing to ‘remain indoors’ presupposes that accused was indoors when the hour of curfew fell and if he were not then indoors he could not commit the offence of failing to remain indoors.”

That we suggest is a non sequitur. Again, when the magistrate later says:

“The offence charged therefore is a breach of that state of continuity. If the state of continuity has not existed there can be no breach of it.”

we think that this conclusion does not logically follow.

In our opinion the order and the Ordinance merely require a state of continuity between the hours of 7 p.m. and 6 a.m. We think that the magistrate has imported into the order and the Ordinance something which was not to be found in the words of each taken in their ordinary meaning. We do not think that the order applies only to persons who are indoors at 7 p.m. We would add that the magistrate’s construction of the words in question could make Part IV of the Ordinance completely nugatory.

Having come to this conclusion on the point of law referred to us, the question arises as to what order we should make. The difficulty is that the magistrate, in an obiter expression of opinion, came to the conclusion that the Public Order Ordinance, 1950 (as amended by the Public Order (Amendment) Ordinance, 1960) or, alternatively, the curfew order, dated May 14, 1961, made under it was ultra vires.

We think that it is desirable to express our opinion on the magistrate’s obiter dictum and to frame our order accordingly. To deal first with the curfew order, we would point out that this was rescinded on May 27, 1961, by Legal Notice No. 302 of 1961. The curfew order was racially discriminatory—it applied only to Africans. It was obviously intended so to be. But s. 10 (1) of the Ordinance specifically allows discrimination in that it provides that curfew orders may be applied to “every member of any class of persons specified” therein. The order is not, therefore, ultra vires the Ordinance. By virtue of the provisions of s. 58 (1) of the Kenya (Constitution) Order-in-Council, 1958, the Council of State is empowered to report to the Governor that in its opinion a legislative instrument such as this order is “a differentiating measure” and may recommend that it be annulled. Sub-section (3) of the same section requires the Governor to forward any such reports to a Secretary of State. Sub-section (4) empowers the Secretary of State to send to the Governor a notification of annulment of such an instrument and requires the Governor, upon receipt of such a notification, to publish it in the *Gazette*. Thereupon the instrument shall be deemed to be annulled as from such date, not being earlier than the date of publication of the notification, as may be specified in the notification. In the present case no notification of annulment had, at the time of the magistrate’s judgment, been published. In our opinion the order was clearly legally in force at that time.

Turning now to the Ordinance, we can find no substance in the suggestion that it is ultra vires the constitution. Clause 5 of the Kenya Royal Instructions, 1958, in so far as it is relevant, provides:

“The Governor shall not, without having previously obtained our instructions through a Secretary of State, assent to any Bill within any of the following classes, unless such Bill contains a clause suspending the

operation thereof until the signification in Kenya of our pleasure thereon, that is to say:

.....

(5) any Bill imposing differential duties”;

In our opinion “duties” here clearly means fiscal duties. But even if the word “duties” is given its secondary meaning of obligations, and thus cl. 5 (5) can be said to apply to the Ordinance, the proviso to s. 3 (2) of the Kenya (Constitution) Order-in-Council, 1958, makes it clear that no court can enquire into the question whether the Governor has complied with Her Majesty’s instructions. That being the case, the magistrate was bound in law to assume that the Ordinance, having been assented to by the Governor, was valid and *intra vires*.

The acquittal is set aside and the case is remitted to the magistrate with a direction that he enter a conviction and make such consequential orders as may be necessary. In the circumstances he may think that this is a suitable case for invoking s. 36 of the Penal Code.

Acquittal set aside. Case remitted to the magistrate with a direction to enter a conviction and make consequential orders.

For the appellant:

KC Brookes (Senior Crown Counsel, Kenya)

The respondent did not appear and was not represented.

For the appellant:

The Attorney-General, Kenya

Kalifani Kizza v Evaristo Julibe [1961] 1 EA 351 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	11 April 1961
Case Number:	L89/1958
Before:	Sir Audley McKisack CJ

[1] *Native law and custom – Mailo land – Suit by caveator – Ownership of land subject to his caveat claimed – Whether principal court or high court has jurisdiction – Buganda Courts Ordinance (Cap. 77), s. 11 (1) (U.) – The Registration of Titles Ordinance (Cap. 123), s. 149 and Part VII (U.).*

Editor’s Summary

The plaintiff and defendant were both Baganda. In 1920 the plaintiff purchased certain land and then

signed an agreement to that effect which he lodged for registration of transfer. In 1939 a caveat was registered in favour of the plaintiff and three months later the defendant was registered as proprietor of the land subject to the caveat. In 1958 the plaintiff sued for an order that the defendant should execute a transfer of the land in favour of the plaintiff. Section 11 (1) of the Buganda Courts Ordinance provides that cases involving questions of title to or any interest in land registered in the Mailo Register under the Registration of Titles Ordinance shall be tried only by the principal court, unless arising under Part VII of the Ordinance, which deals with caveats and the procedure relative thereto. The question in issue was whether this case was a case “involving questions of title to or any interest in land registered in the Mailo Register” or “a case arising” under Part VII of the Registration of Titles Ordinance.

Held – since the defendant was admittedly the registered proprietor, the plaintiff’s claim against the defendant could not be sustained without reliance upon the caveat and invoking the machinery provided by Part VII of the

Registration of Titles Ordinance; accordingly the High Court had jurisdiction to try the case.

Order accordingly.

No cases referred to in judgment

Judgment

Sir Audley McKisack CJ: This suit raises a question of jurisdiction—whether the suit is triable by the High Court of Uganda or by the Principal Court of Buganda. Section 11 (1) of the Buganda Courts Ordinance (Cap. 77 of the Laws of Uganda) is as follows:

“A case involving questions of title to or any interest in land registered in the Mailo Register under the Registration of Titles Ordinance or any Ordinance amending or replacing the same shall be tried only by the principal court, except a case arising under Part VII of the said Ordinance.”

The plaint is as follows:

- “1. The plaintiff is a Muganda of Namugongo, Kyadondo whose address for service in this case is care of Messrs. Haque and Gopal, Advocates, Kampala.
 - “2. The defendant is a Muganda of Mayungwe, Muluka Mut. I, Gomb. Sabawali, Butambala.
 - “3. On or about December 1, 1920, the plaintiff purchased from one Benenego Ngobya 4.60 acres of land comprised in the Mailo Register, Vol. 198, folio 14, and executed an agreement to the effect bearing such date, such agreement having been duly lodged with the Registrar of Titles for registration of transfer and on January 27, 1939, a caveat was registered in favour of the plaintiff by virtue of the transfer agreement.
 - “4. On May 2, 1939, the defendant was registered as proprietor of the said land subject to the plaintiff’s said caveat.
 - “5. The plaintiff is entitled to secure from the defendant a transfer in his (plaintiff’s) favour of the said land.
 - “6. The defendant refuse/neglects in spite of demand to effect a transfer in favour of the plaintiff.
- “Wherefore the plaintiff prays as follows:
- (a) An order that the defendant shall execute the transfer of the said lands in favour of the plaintiff.
 - (b) Costs.
 - (c) Any alternative relief.”

The case is clearly one which (in the words of s. 11 (1) of the Buganda Courts Ordinance) is a case:

“involving questions of title to or any interest in land registered in the Mailo Register”.

But it remains to decide whether it is “a case arising under” Part VII of the Registration of Titles Ordinance (Cap. 123 of the Laws of Uganda). That part deals with the lodging and withdrawing of caveats, the consequences thereof, and the procedure relating thereto. And there is provision (in s. 149) whereby a registered proprietor may summon a caveator to attend before the High Court to show cause why the caveat should not be removed. The same section also empowers the High Court to extend the operation of the caveat. Proceedings under that section would, of course, come within the exception

to s. 11 (1) of the Buganda Courts Ordinance as cases “arising under” Part VII of the Registration of Titles Ordinance.

For the purpose of deciding the nature of the instant case, one must look at the contents of the plaint. The case is not under s. 149 of the Registration of Titles Ordinance, but it is a case in which (according to the plaint) the plaintiff is a caveator and the defendant is the registered proprietor of the land in question. The plaintiff claims that the defendant’s proprietorship is “subject to the plaintiff’s caveat” (para. 4 of the plaint), which had been lodged a few months before the defendant became the registered proprietor. The caveat relates to an alleged sale of the land to the plaintiff in 1920. Since the defendant is admittedly the registered proprietor, I do not think that the plaintiff’s claim against him could be sustained without reliance on this caveat. It will not suffice for him to prove that he bought the land in 1920. He will also have to show that he protected the interest he claims arising out of that purchase by invoking the machinery provided by Part VII of the Registration of Titles Ordinance. That seems to me a sufficient reason for saying that this case “arises under” Part VII. I do not think that the exception in s. 11 (1) of the Buganda Courts Ordinance ought to be construed as referring only to proceedings under s. 149 of the Registration of Titles Ordinance. The last mentioned section expressly refers to the high court, and to the high court alone. Consequently I doubt if the exception in s. 11 (1) of the Buganda Courts Ordinance would be necessary if its purpose was merely to confirm, as it were, that proceedings under s. 149 of the Registration of Titles Ordinance were solely within the jurisdiction of the High Court.

Since the instant case is one which, for the reason I have given, is properly to be treated as a case arising under Part VII of the Registration of Titles Ordinance, it is not one which must be tried by the principal court. The hearing will proceed in the High Court.

Order accordingly.

For the plaintiff:

Z Haque

The defendant did not appear and was not represented.

For the plaintiff:

Advocates: *Haque & Gopal*, Kampala

The Attorney-General v Manilal P Patel and others
[1961] 1 EA 354 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	14 April 1961
Case Number:	1398/1960
Before:	Sir Ronald Sinclair CJ and MacDuff J

[1] *Criminal law – Evidence – Statement – Admissibility – Corruption – Statements by accused to police while in custody – Statement held inadmissible – Statement made after being charged with offence under s. 4 (1) (b) of the Prevention of Corruption Ordinance, 1956 – Accused tried for offence under s. 3 (2) – Whether magistrate justified in excluding statements – Prevention of Corruption Ordinance, 1956, s. 3 (2) and s. 4 (1) (b) (K.).*

[2] *Case stated – Interlocutory decision of magistrate erroneous in point of law – When interlocutory decision renders final determination also erroneous in point of law – Criminal Procedure Code (Cap. 27), s. 367 (K.).*

Editor's Summary

The respondents were jointly tried for contravening s. 3 (2) of the Prevention of Corruption Ordinance, 1956. At the trial the prosecutor sought to put in evidence certain statements made by the respondents to the police when charged with an offence under s. 4 of the Ordinance. The magistrate ruled that all the statements were inadmissible on the ground that the respondents would not necessarily have made the same statements if they had been charged under s. 3 of the Ordinance. At the close of the case for the prosecution the magistrate acquitted the respondents on the ground that there was no case for them to answer. The Attorney-General appealed from that decision by way of case stated, and it was contended that as the magistrate refused to admit the statements on wrong grounds he did not have all the evidence before him and, therefore, his final determination was wrong in law.

Held –

- (i) the magistrate was wrong in excluding the statements on the grounds he relied upon; if the statements were relevant it was immaterial that they were made on the basis of a different charge.
- (ii) in determining the admissibility of each statement the tests to be applied were whether the statement was voluntary, and if so, was the statement relevant to the charge on which the respondent was being tried.
- (iii) by excluding statements on wrong grounds and deciding that there was no case to answer on the remaining evidence, the magistrate arrived at his final determination on a ground which was erroneous in point of law.

Appeal allowed. Acquittals set aside. Case remitted to the magistrate for hearing of further evidence.

Cases referred to:

- (1) *R. v. Evans*, [1950] 1 All E.R. 610; 34 Cr. App. R. 72.
- (2) *Attorney-General v. Hassanali Hasham Jiwa*, Kenya Supreme Court Criminal Appeal No. 788 of 1958 (unreported).
- (3) *Rigby v. Woodward*, [1957] 1 W.L.R. 250; [1957] 1 All E.R. 391.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The three respondents were jointly charged before the resident magistrate's court, Nairobi with the following offence:

“Corruption contrary to s. 3 (2) of the Prevention of Corruption Ordinance, 1956.

Particulars of Offence

“Manilal P. Patel, Chaganbhai K. H. Patel and Hiralal R. C. Kiradias on the 5th day of August, 1960, in the Nairobi Extra Provincial District, corruptly gave the sum of Shs. 4,500/- to John Clark, a person employed by a public body, namely the Immigration Department of the Government of Kenya as an immigration officer, as a reward for having provided passports for Dayalji R. S. Patel, Krishnalal B. K. Patel and Maganbhai K. Patel, a matter in which the said body was concerned.”

At the close of the case for the prosecution the trial magistrate acquitted the respondents on the ground that there was no case for them to answer. The Attorney-General now appeals from that decision by way of case stated.

At the trial the first respondent, Manilal P. Patel, was the first accused, the second respondent, Chaganbhai K. H. Patel was the second accused and the third respondent, Hiralal R. C. Kiradias was the third accused.

The evidence for the prosecution in outline was as follows:

In July and at the beginning of August, 1960, Chotabhai Panabhai Kiradia met Mr. Clark, an immigration officer employed by the Government of Kenya, on several occasions in connection with the issue of passports to certain illegal immigrants. At that time Mr. Clark was working with the Criminal Investigation Department, Nairobi Area, on an investigation concerning the issue of passports. Kiradia obtained from Mr. Clark application forms for passports for Krishnalal Patel, Dayalji Patel, Maganlal Patel and Murabhai. Krishnalal Patel was employed by the third respondent in Nakuru. Kiradia met the third respondent and Krishnalal Patel in Nairobi and told the third respondent that the price had been agreed at £200. The third respondent “O.K.’d” the price. The application form for Krishnalal’s passport was then completed. On the following day Kiradia collected £25 which had been left at the house of a relative of the third respondent. Subsequently Kiradia handed the completed application form to Mr. Clark. At about the same time Kiradia met the second respondent and Dayalji Patel when it was agreed that Kiradia would obtain a passport for Dayalji. The application form for Dayalji’s passport was completed and subsequently handed to Mr. Clark by Kiradia. Mr. Clark’s evidence was that on August 2, 1960, Kiradia gave him the application forms in respect of Dayalji and Maganlal together with £44 and that on August 4, 1960, Kiradia handed him the application form in respect of Krishnalal together with £25. Kiradia said in evidence that of the £44, £25 came from a relative of the third respondent and the balance from Maganlal. He also said that the £25 which he gave to Mr. Clark he had obtained from the first respondent. On August 5, 1960, Kiradia in a Morris Minor drove to the G.P.O. car park in Delamere Avenue, Nairobi, where he met Mr. Clark. In the car with him were the second and third respondents and one Naranbhai. Mr. Clark had also gone to the car park in a motor car. When Mr. Clark arrived Kiradia came up and sat in the front seat with him. There Kiradia gave Mr. Clark £225 and received in return three passports in respect of Krishnalal, Dayalji and Maganlal. Kiradia said that of this sum of £225, he obtained £75 from the second respondent, £75 from the third respondent and £75 from Murabhai. Kiradia returned to the Morris Minor with the passports whereupon the second and third respondents and a third Asian went up to Mr. Clark in his car. The second respondent shook hands with Mr. Clark and said: “Thank you for the passport”. The three Asians then returned to the Morris Minor. In accordance with a prearranged signal

the police then arrived and arrested the second and third respondents and Kiradia. In the tray under the dashboard of the Morris Minor were found the three passports.

At the trial the prosecutor wished to put in evidence certain statements alleged to have been made to the police by the respondents on the basis of a charge under s. 4 of the Prevention of Corruption Ordinance, 1956, one by the first respondent, one by the second respondent and three by the third respondent. Section 4 of the Prevention of Corruption Ordinance relates to corrupt transactions by agents.

Chief Inspector Chopra gave evidence as to the statement made by the second respondent. He said:

“I am a Chief Inspector of Police attached to Nairobi Area C.I.D. on August 7, 1960, I recorded a statement under caution from accused II. Prior to this I had told him he was under arrest and that I was investigating the case. We spoke in Hindustani, with a few words of English. I know both languages well. I recorded the statement in English. I know both languages well. I recorded the statement in English. I read it back in Hindustani to accused II. He agreed it was correct and signed it.”

At that stage Mr. Patel for the second respondent objected to the statement being admitted in evidence on the ground that the second respondent was then charged under s. 4 (1) (b) of the Prevention of Corruption Ordinance whereas the charge on which he was being tried was under s. 3 (2) of the Ordinance. Mr. Kapila for the third respondent objected to the admissibility of the statements made by the respondent on the same ground, and Mr. Kean for the first respondent associated himself with those submissions in regard to the statements made by the first respondent.

The magistrate then ruled that all the statements were inadmissible. We quote his ruling in full:

“It is a cardinal and settled axiom of English law that, before he pleads, an accused person must be made aware of every ingredient of the charge made against him. If this were not so he would be unable properly to formulate his defence. But if the deviation between the charge and the offence proved is so slight that no injustice is done and it would have had no effect upon the defence of the accused person, then a conviction may stand.

“In my view the same principle should apply to statements made under caution.

“To my way of thinking the crux of the present matter is whether the statements made by the accused, having been charged under s. 4 of the Prevention of Corruption Ordinance, would necessarily have been the same as any statements they may have made had they been charged as they are today under s. 3 of that Ordinance.

“All accused made their statements in some cases more than one, after the proper and necessary caution.

“They were told that the charge was under s. 4—the section dealing with an agent. There has been before the court that very agent—Chotabhai Kiradia. There is corroboration of his evidence—he is a convicted felon—that the accused were in touch with him concerning passports.

“It is possible that they said to themselves that it was inevitable that this evidence come to light and on that basis made their statements.

“As far as accused 1 is concerned he was told at the time of his arrest that his offence was corruption of an immigration officer. Before making his statement, however, he was told that the charge was in connection

with an agent. He went willingly to the police station on the basis of the first charge saying, 'I have nothing to hide'. It may be that he felt he had a complete defence against the first charge but altered his mind when the agency charge was read to him. He might well have said something entirely different if at the police station the charge had been made on the basis of what C/I Leslie said at the time of his arrest.

"Accused 2 was arrested by Inspector Giltrap. There is no evidence before the court that I/P Giltrap told accused why he was arresting him or the nature of any charge he might have to face.

"Before making his statement the charge against him was read to him. This also was under s. 4—that relating to agents.

"My remarks in connection with accused I apply to this accused with equal force, as indeed they do to the third accused with this difference, that, according to the record up to the present time, the third accused has not yet been arrested.

"It has been argued forcibly and ably by the prosecution that the use of the word corruption was all that was necessary to make the accused aware of what they had to face. In some cases I would agree, but not in this. Here was an agent, and also a public servant. The evidence of contact with the agent was strong and they must have known that. As to the evidence of contact with the public servant I shall, at this stage go no further than to say that it is not so strong. The possibility that the accused might have said something different—or indeed nothing at all—had they been charged as they are today cannot be overlooked.

"I therefore rule that all statements made on the basis of a charge under s. 4 of the Prevention of Corruption Ordinance are inadmissible."

The first four of the questions on which the opinion of the court is sought relate to the grounds on which the magistrate held that the statements were inadmissible. It seems that the magistrate held that the statements were inadmissible on the ground that the respondents would not necessarily have made the same statements if they had been charged under s. 3 of the Prevention of Corruption Ordinance. In our view the magistrate was clearly wrong in so holding. In determining the admissibility of each statement the tests to be applied were:

- (a) Was the statement voluntary?
- (b) If so, was it relevant to the charge on which the respondent was being tried?

See *R. v. Evans* (1), 34 Cr. App. R. 72. If the statements were relevant it is immaterial that they were made on the basis of a different charge. It is, in our view, also immaterial to their admissibility that the respondents might have made different statements if they had been made on the basis of a charge under s. 3 (2) of the Ordinance. The magistrate had a discretion to exclude the statements if they were unfairly obtained, but that was not the ground on which he excluded them.

On a case stated this court can interfere with the determination by a magistrate of proceedings before him only on the ground that the determination is erroneous in point of law or in excess of jurisdiction: s. 367 of the Criminal Procedure Code. It is common ground that "determination" means the final determination of the proceedings and does not include an interlocutory decision in those proceedings. However, it is competent for the court to consider the correctness or otherwise of an interlocutory decision if such decision results in the final determination being erroneous in point of law. In the present case the final determination in question is the acquittal of the respondents on the

ground that they had no case to answer. The question which now falls to be decided is whether the exclusion of the respondents' statements on a ground which was erroneous in point of law resulted in a final determination which was erroneous in point of law.

The difficulty in this case lies in the fact that the statements are not before us. Had they been properly proved and marked for identification we could have taken them into consideration with the other evidence in determining whether there was a case for the respondents to answer. That was the course taken in *Attorney-General v. Hassanali Hasham Jiwa* (2), Criminal Appeal No. 788 of 1958 (unreported). Counsel for the Crown concedes, and we agree with him, that we cannot look at the statements in this case.

For the Crown it was contended that as the magistrate refused to admit the statements on wrong grounds he did not have all the evidence before him and, therefore, that his final determination which was not based on all the evidence must be wrong in law. On behalf of the respondents it was submitted that as the contents of the statements which the Crown sought to adduce in evidence are not known, it cannot be said that if the magistrate had taken them into consideration he must have arrived at a different conclusion and, therefore, it cannot be held that his final determination was wrong in law. It is not sufficient, it was argued, to show that the magistrate might have arrived at a different conclusion: it must be shown that he could not reasonably have arrived at any other conclusion but that there was a case for all the respondents to answer.

We think that the contention of the Crown is correct. There appears to be no authority directly in point, but the decision in *Rigby v. Woodward* (3), [1957] 1 W.L.R. 250 is, in our view, pertinent. In that case the defendant was charged, together with another man, with unlawful and malicious wounding. At the hearing before the justices the co-defendant gave evidence that the defendant had hit the complainant but the justices, thinking it their duty to exclude from their minds evidence of one co-defendant tending to incriminate another, refused to allow the defendant's solicitor to cross-examine the co-defendant, and, considering the evidence of the complainant conclusive against the defendant, convicted him. The co-defendant was acquitted. The justices, on the application of the defendant, stated a case for the opinion of the High Court, under s. 87 of the Magistrates' Courts Act, 1952, the question of law for the opinion of the court being whether, upon the facts stated by the justices, they had come to a correct determination and decision in point of law. It was held:

"That the justices' refusal to allow cross-examination of the co-defendant was a departure from the ordinary principles of justice for which the proper remedy was an application for an order of certiorari (when the court would have had to consider whether the irregularity was such that the conviction ought to be quashed) but that nevertheless the matter came within s. 87 of the Magistrates' Courts Act, 1952, for a radical departure from the well-known principles of justice and procedure made a decision given after that departure wrong in law so that the defendant was questioning the justices' decision on the ground that it was wrong in law. The court, therefore, had no alternative but to answer the question of law in the defendant's favour, and, as it would not be right to remit the case to the justices for them to resume the hearing, since there was no means of ensuring that the evidence of which the appellant had been deprived would be available, the conviction must be quashed."

Lord Goddard, C.J., said in his judgment:

"It seems to me that the present appellant does question the justices' decision on the ground that it is wrong in law, because if justices proceed

in this way it cannot be said that the conviction is one which has been obtained in the due and proper course of law. A radical departure from the well-known principles of justice and procedure seems to me to make a decision given after that departure wrong in law.

“The Summary Jurisdiction Act, 1857, was the first Act which enabled courts of summary jurisdiction to state a case. [His lordship read s. 6 of that Act and continued]: Sometimes justices who before they have decided a case have some question of law arising before them state a case for the opinion of the court and ask their opinion on it. There are other cases in which justices dismiss the information and the prosecutor brings the case up saying that there has been a mistake of law, or that on the facts proved the only proper decision could have been a conviction, or again the defendant may bring up the case claiming that on the facts found by the justices he was entitled to be acquitted. But there is no power to order a re-trial in the ordinary sense of that expression. If this court holds that on a submission of no case to answer justices were wrong in stopping it they can be ordered to resume the hearing of the case because they very likely have not heard the defence. If we sent this case back, I do not see how it could be dealt with. The co-defendant who gave evidence and was acquitted and was not cross-examined might possibly not be found. We do not know where he is or whether he can be called. We cannot make the prosecution call him. It seems to me that there has been an unfortunate departure from the ordinary principles of justice. It has resulted in a conviction, and although it may be that the appellant is guilty and that the justices were right in the opinion they formed, we cannot allow a proceeding of this sort to stand. We must decide the question of law that is raised here in favour of the appellant and, having done so, as it seems to me that it is impossible for us to order a re-trial, which I do not think we have power to do, it follows that the conviction must be quashed. I regret it, but that is the only decision we can give.”

The judgment of Lynskey, J., another member of the divisional court, was:

“I agree with great reluctance, but it seems to me here that the justices have clearly gone wrong. They have deprived the appellant of the right of obtaining certain evidence from the co-defendant. That co-defendant has now been acquitted, and we cannot remit the case to the justices with the opinion of the court thereon as the justices could not act on this opinion because the co-defendant cannot be brought back. The result is that the justices made an error which we cannot put right, and that being so there is no course open to us except to quash the conviction.”

In that case it could not, of course, be known what evidence would have been extracted from the co-defendant in cross-examination and therefore it could not be said that the justices would necessarily have arrived at a different conclusion. Nevertheless, it was held that the refusal of the justices to allow the defendant’s solicitor to cross-examine the co-defendant was such a departure from the principles of justice and procedure that the conviction was one which had not been obtained in the due and proper course of law.

In the present case the Crown has been wrongly deprived of the opportunity of having the respondents’ statements admitted in evidence. Those statements formed part of the case for the prosecution and they might well have been a crucial factor in determining whether there was a case for the respondents to answer. In our opinion by excluding the statements on wrong grounds and deciding that there was no case to answer on the remaining evidence, the magistrate arrived at his determination on a wrong basis and it was accordingly

erroneous in point of law. In those circumstances the determination should not be allowed to stand.

In *Rigby v. Woodward* (3), the position could not be rectified, but in the present case it can. On the hearing of a case stated the court has wide powers. Section 371 of the Criminal Procedure Code (omitting the proviso which is not material) reads:

“The Supreme Court shall (subject to the provisions of the next succeeding section) hear and determine the question or questions of law arising on the case stated, and shall thereupon reverse, affirm or amend the determination in respect of which the case has been stated, or remit the matter to the subordinate court with the opinion of the Supreme Court thereon, or may make such other order in relation to the matter, and may make such order as to costs, as to the court may seem fit.”

and para. (b) of s. 372 provides:

“372. The Supreme Court shall have power, if it thinks fit:

- (a) . . .
- (b) to remit the case to the subordinate court for rehearing and determination with such directions as it may deem necessary.”

We think that the case must be remitted to the trial magistrate to give the Crown an opportunity of properly proving the statements alleged to have been made by the respondents. The respondents will, of course, be at liberty to contest the admissibility of the statements on other grounds, for instance, on the ground that they were not voluntary. After hearing such evidence as is relevant to the statements, the magistrate should then decide whether on the evidence there is a case for the respondents or any of them to answer, and thereafter proceed according to law.

It is conceded that if the statement alleged to have been made by the first respondent is not admitted, there is no case for him to answer. It is agreed by counsel for the Crown and counsel for the respondents that it is unnecessary, indeed undesirable, to answer the other questions submitted for the opinion of the court since, if the statements are admitted, those questions may be purely academic.

In the result we allow the appeal, set aside the acquittals of the respondents and remit the case to the trial magistrate with the following directions:

- (i) to reopen the case and hear such evidence as may be adduced by the Crown and, if appropriate, by the respondents with regard to the statements alleged to have been made by the respondents;
- (ii) to decide the question of the admissibility in evidence of each of the statements tendered in evidence in the light of our opinion and of such evidence;
- (iii) thereafter to decide in respect of each respondent if there is a case for him to answer, and in respect of any accused found to have a case to answer to put him on his defence and proceed according to law.

Appeal allowed. Acquittals set aside. Case remitted to the magistrate for hearing of further evidence.

For the appellant:

KC Brookes (Ag. Deputy Public Prosecutor, Kenya)

For the first respondent:

M Kean

For the second and third respondents:

AR Kapila

For the appellant:

Advocates: *The Attorney-General*, Kenya

For the first respondent:

Sirley & Kean, Nairobi

For the second and third respondents:

SR Kapila & Kapila

Shivabhai G Patel v Chaturbhai M Patel
[1961] 1 EA 361 (HCU)

Division: HM High Court of Uganda at Mbale
Date of judgment: 26 June 1961
Case Number: 28/1961
Before: Sir Audley McKisack CJ

[1] *Money-lender – Evidence – Proof that person is money-lender – No evidence of loans to anyone except defendant – Meaning of word “business” – Money-lender Ordinance, 1951, s. 2 (U.).*

[2] *Money-lender – Statement of account – Money lent on many occasions – Lender not carrying on business of money-lender – Whether lender must produce statement of account – Money-lenders’ Ordinance, 1951, s. 9, s. 11 (1), s. 12 and s. 20 (U. – Civil Procedure Rules, O. 7, r. 18 (1) (U.) – Rules of Supreme Court, O. XXXI, r. 10.*

Editor’s Summary

The plaintiff sued upon four promissory notes made in his favour by the defendant and interest thereon. The defendant said he had executed the promissory notes as security for a money-lending transaction. The defendant pleaded several defences based upon the Money-lenders’ Ordinance and at the hearing his advocate cross-examined the defendant regarding loans to other persons. The only transactions admitted by the plaintiff were loans on mortgage prior to 1949 and no evidence was called to prove that the plaintiff had made loans to anyone except the defendant. It was submitted *inter alia* for the defendant that the plaintiff’s failure to produce a statement of account as required by s. 11 (1) of the Ordinance was fatal to his case.

Held –

- (i) the word “business” in the context of money-lending transactions imports the notion of system, repetition and continuity; and the number of the money-lending transactions, as well as their nature, must be considered.
- (ii) the evidence had not proved that the plaintiff was a money-lender within the meaning of the

Money-lenders' Ordinance, 1951.

- (iii) a statement of account is not required by s. 11 (1) to be produced except in relation to a loan by a money-lender as defined in the Money-lenders' Ordinance, 1951.

Judgment for the plaintiff.

Cases referred to:

- (1) *Mulji Jetha Ltd. v. Chanan Shah* (1949), 23 K.L.R. 46.
- (2) *Litchfield v. Dreyfus*, [1906] 1 K.B. 584.
- (3) *Edgelow v. MacElwee*, [1918] 1 K.B. 205.

Judgment

Sir Audley McKisack CJ: The plaintiff sues upon four promissory notes made in his favour by the defendant for a total sum of Shs. 15,960/40, and for interest thereon at 9 per cent. per annum for the period July 27, 1959, to March 10, 1961, amounting to Shs. 2,322/97. The claim for interest is made under s. 57 of the Bills of Exchange Ordinance (Laws of Uganda, Cap. 217).

The defendant admits having executed the promissory notes, but says that they were given as security for a money-lending transaction, and he pleads various defences based on the provisions of the Money-lenders' Ordinance, 1951.

The first question is whether the plaintiff at the time he made the loans for which the promissory notes were given as security was a money-lender within the meaning of the Money-lenders' Ordinance, 1951. The term is defined in s. 2 of the Ordinance as follows:

“ ‘money-lender’ includes every person whose business is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or owns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or agent; but shall not include . . .”

(I have omitted the last part of the definition—the persons who are not included in it—as this does not affect the questions I have to decide.)

It is not disputed that, as shown in a statement of account (exhibit “D”), the plaintiff lent money on numerous occasions during 1949, 1950 and 1951; on one occasion in 1953; on two occasions in 1954; on one occasion in 1955 and on one occasion in 1959. All these loans were to the defendant and bore interest at the rate of 9 per cent. per annum. There is no satisfactory evidence of the plaintiff having lent money to any other persons during the period that he was making these loans to the defendant, though an attempt was made by the defence to show that he did engage in such transactions. The most that could be obtained from him in cross-examination was that he, or his wife, had lent some money on mortgages before 1949. No witnesses were called by the defence to testify to any money-lending transactions between the plaintiff and themselves (apart from the loans to the defendant).

The plaintiff has been in employment as a clerk or accountant from the time he first came to Uganda, and is still so employed. This, of course, would not of itself exclude him from the statutory definition of money-lender, but I think it is not irrelevant to the question whether he can be said to have been carrying on the business of money-lending.

The definition of money-lender in the Money-lenders' Act, 1900, of the United Kingdom is not identical with the one in the Uganda Ordinance but both include the expression “every person whose business is that of money-lending”. The English definition has been considered in various English cases, which have been discussed in a Kenya case, *Mulji Jetha Ltd. v. Chanan Shah* (1) (1949), 23 K.L.R. 46. The principle to be derived from these cases is that the word “business” in this context imports the notion of system, repetition and continuity; and the number of the money-lending transactions, as well as their nature, must be considered.

It is clear in the instant case that the loans made were numerous but, on the other hand, they were all to one person. In *Litchfield v. Dreyfus* (2), [1906] 1 K.B. 584, Farwell, J., said at p. 589:

“Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible.”

McCardie, J., in *Edgelow v. MacElwee* (3), [1918] 1 K.B. 205 observed that this dictum of Farwell, J., might require future consideration. But, as far as I am aware, it has not been further criticised in any later case.

Not without hesitation I come to the conclusion that the plaintiff in the instant case has not been proved to be a money-lender within the meaning of the Money-lenders' Ordinance, 1951. That finding disposes of those lines of defence which were based on the plaintiff coming within that definition, that is to say: (a) that the transactions were illegal because he was not licensed as a money-lender; (b) that the note or memorandum of the contract for repayment

of the money lent did not comply with s. 7 (2) of the Ordinance; (c) that the action is time barred under s. 20 of the Ordinance. (Section 7 and s. 20 apply only in relation to money-lenders as defined in the Ordinance). Mr. Shah, for the defendant, has also referred me to s. 22 of the Ordinance, which provides that the Ordinance shall not apply to certain types of transactions described in the section, and argues that money-lending transactions other than those so specified constitute the person a money-lender notwithstanding that he would not otherwise fall within the statutory definition. I am unable to agree. The fact that certain transactions are declared to be outside the provisions of the Ordinance does not mean that any other form of money-lending must be within it, or that the person who enters into such a transaction must be a money-lender; if that was so, a loan given free of interest would amount to a money-lending transaction within the Ordinance, and would make the lender a money-lender as defined in the Ordinance.

There remains one line of defence which it is contended is independent of proof that the plaintiff was a money-lender as defined in the Ordinance. It is based on s. 11 (1), which is as follows:

“Where proceedings are taken in any court by any person for the recovery of any money lent, or the enforcement of any agreement or security made or taken in respect of money lent, the plaintiff shall produce a statement of his account as prescribed in s. 9.”

No such statement has (to use the wording of the sub-section) been “produced”, and Mr. Shah argues that this is fatal to the plaintiff’s claim. He points out that the word “money-lender” does not occur in this sub-section, which covers any “proceedings . . . by any person for the recovery of any money lent” Elsewhere in the Ordinance one frequently finds references to “proceedings by a money-lender” or to “money lent by a money-lender” (see, for example, s. 7 and s. 12), and this is in sharp contrast to the wording of s. 11. He refers me also to O. 3, r. 10, of the (English) Rules of the Supreme Court and to the comment thereon in the Annual Practice, 1961, at p. 34. That rule requires that, in an action for the recovery of money lent by a money-lender, the endorsement on the writ shall state certain specified particulars concerning the loan, and the comment is that failure to comply with the rule is not an irregularity that can be waived but is a matter of substance rendering the writ and all subsequent proceedings thereon defective. Mr. Shah says that the result of failure to comply with s. 11 (1) of our Ordinance at the time of filing the plaint would be the same, and that, by reason of the wording of that sub-section, this is so whether the money was lent by a money-lender or by any other person.

Assuming for the moment that the requirements of s. 11 (1) do apply to the claim in the present case, I am nevertheless doubtful whether failure to comply with them at the time of filing the plaint would necessarily be fatal to the claim. The words used in the sub-section are “the plaintiff shall produce a statement”; it is not in terms required that the plaint shall contain or be accompanied by the statement, but Mr. Shah says that this must be the meaning of the term “produce”. I agree with him to the extent that this would be the normal mode of “producing” the statement, but failure so to produce it at that stage might not preclude the court permitting its production at a later stage. A comparable provision is that of r. 18 (1) of O. 7 of the Civil Procedure Rules which (so far as it is relevant) says:

“A document which ought to be produced in court by the plaintiff when the plaint is presented . . . and which is not produced . . . shall not, without the leave of the court, be received in evidence on his behalf at the hearing of the suit.”

It may be that it would be open to the court, where objection is taken by a defendant under s. 11 (1) of the Money-lenders' Ordinance, 1951, to give leave for the statement of account to be produced after the plaint has been filed, so that the plaint would not be rendered defective.

It is not, however, necessary for me to express any concluded opinion on that point, because I think that, despite the absence of a reference to a "money-lender" in s. 11 (1), that sub-section nevertheless only applies to a loan by a money-lender as defined in the Ordinance. The statement which is required by this sub-section to be produced by the plaintiff is "a statement of his account as prescribed in s. 9", and s. 9 applies only to "every contract for the repayment of money lent by a money-lender"; and the particulars to be contained in the account prescribed by that section expressly refer to payments received by and sums due to "the money-lender". It follows, in my opinion, that a statement of account is not required by s. 11 (1) to be produced except in relation to a loan by a money-lender as defined in the Ordinance. Consequently this line of defence also fails.

In the result no defence has been established to the claim, and there will be judgment for the plaintiff for Shs. 18,283/37 with costs and interest as prayed.

Judgment for the plaintiff.

For the plaintiff:

JS Patel

For the defendant:

JM Shah

For the plaintiff:

Advocates: *JS Patel*, Mbale

For the defendant:

Patel & Shah, Mbale

Leosoni alias Leonsion s/o Matheo v R
[1961] 1 EA 364 (CAN)

Division:	Court of Appeal of Nairobi
Date of judgment:	3 May 1961
Case Number:	6/1961
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Sir Owen Corrie Ag JA
Appeal from:	H.M. High Court of Tanganyika—Williams, J

[1] Criminal law – Provocation – Mistake – Mistake that blow deliberate – Whether lawful act can be provocation – Distinction between mistake of fact and mistake of law – Penal Code, s. 11, s. 201 and s. 202 (T.).

Editor's Summary

During an appeal from a conviction for murder the attention of the court was drawn to a passage in the judgment of the trial judge. The passage referred to a fist blow which the deceased struck the appellant on the head or face after the appellant had caught hold of the deceased's arm. The trial judge considered that this injury should be accepted in the appellant's favour and continued: "It can further be assumed in his favour that, although it was probably inflicted as a lawful reaction of deceased to being taken hold of, the accused himself did not believe it to be (see *R. v. Jehoshaphat Rujambi Mwaniki* (1942), 9 E.A.C.A. 40)." It was submitted that this was a misdirection because if the act of the deceased in striking the appellant was lawful, it was immaterial what the appellant believed; that under s. 202 of the Penal Code a lawful act could never be provocation such as to reduce a killing from murder to manslaughter; that the test whether an act was lawful or not was objective and that a subjective test was applicable only when it appeared that the act relied on as provocative was wrongful and likely when done to an ordinary person to deprive him of the power of self-control. The appellant court, having been invited to express its opinion upon the passage, agreed to do so whilst emphasising that its opinion would be obiter.

Held –

- (i) section 202 of the Penal Code must be read with s. 11 thereof; s. 11 relates to mistakes of fact and the intention of the section appears to be to apply the common law rules as to mistake.
- (ii) an accused acting under a reasonable mistake of fact, when that mistake, if true, would lead to the application of s. 201 of the Penal Code, is entitled to rely on that mistake.
- (iii) in the instant case there was no question of mistake of fact; the mistake, if any, on the part of the appellant would have been as to the justification for the blow, which was a matter of law.
- (iv) the passage was misdirection, due to failure to distinguish between a mistake of fact and a mistake of law, but it was not material since the trial judge had held that, even if the blow could have been regarded as provocation, it could not excuse the method of retaliation employed by the appellant.

Appeal dismissed.

Case referred to:

- (1) *R. v. Jehoshaphat Rujambi Mwaniki* (1942), 9 E.A.C.A. 40.

Judgment

The following judgment prepared by **Sir Alastair Forbes V-P:** was read by direction of the court:

The appellant was, on January 17, 1961, convicted by the High Court of Tanganyika of the murder of one Socrates Eustace, and was sentenced to death. He appealed to this court against such conviction and sentence. We were satisfied that there was no merit in the appeal which we accordingly dismissed. Crown Counsel, however, drew our attention to a passage in the judgment of the learned trial judge which, he contended, was a misdirection, and invited us to comment on it.

The passage in question relates to an alleged fist blow which, the appellant stated, the deceased struck him on the head or face after he (the appellant) had caught hold of the deceased's arm. The learned judge considered that the sustaining of this injury should be accepted in the appellant's favour. The learned judge continued:

"It can further be assumed in his favour that, although it was probably inflicted as a lawful reaction of deceased to being taken hold of, accused himself did not believe it to be (see *R. v. Jehoshaphat Rujambi Mwaniki* (1942), 9 E.A.C.A. 40)."

Crown Counsel argued that if the act of the deceased in striking the appellant was lawful, it was immaterial what the appellant believed; that under s. 202 of the Penal Code, which defines the "provocation" which will, under s. 201 of the Penal Code, reduce a killing from murder to manslaughter, a lawful act can never be provocation; that the test whether an act is lawful or not is objective and not subjective, a subjective test being applicable only when it appears that the act relied on as provocative is wrongful and is of such a nature as to be likely when done to an ordinary person to deprive him of the power of self-control.

The passage in *R. v. Jehoshaphat Rujambi Mwaniki* (1) (1942), 9 E.A.C.A. 40 on which the learned judge based the observation complained of, reads as follows:

"What then is the position? The accused is struck by the deceased accidentally or otherwise, is provoked

thereby and retaliates. But can it be said that he was provoked by a wrongful act on the part of the deceased?
It may have been, for to use a panga in a negligent manner thereby causing

harm may be a wrongful act and indeed a wrongful act to constitute provocation need not be more than a tortious one. The kernel of the case is whether the accused honestly and reasonably but mistakenly may have believed that he was the victim of a wrongful act on the part of the deceased, and as to that it will suffice if there be a reasonable doubt on the point. We think there is such a doubt and accordingly we substitute a finding of manslaughter for murder and sentence the accused to three years hard labour.”

Crown Counsel argued that since there was doubt whether the provocative act of the deceased was wrongful or not, that was sufficient for the decision of the case; that therefore the reference to the belief of the accused was unnecessary and should be treated as obiter; and he asked the court to disapprove the passage cited in so far as it relates to the relevance of the belief of an accused.

It is by no means clear to us that the passage in question is obiter. It may be that the court could have put its decision on other grounds, but the basis relied on was undoubtedly the mistaken belief of the accused. And it is to be noted that any opinion we express is obiter, since it is not material to the decision of this case. As, however, we have been asked to express our opinion, we will do so.

The material words of s. 202 of the Penal Code, for the purposes of the point under consideration, are:

“The term ‘provocation’ means and includes, except as hereinafter stated, any wrongful act or insult . . . A lawful act is not provocation to any person for an assault . . .”

With s. 202 must be read s. 11 of the Penal Code, which is as follows:

“11. A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

“The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.”

Crown Counsel did not advert to s. 11 but, no doubt, would have argued that the application of s. 11 is excluded by the words of s. 202 set out above. However, we do not think this is the case. In our view the last sentence of s. 11 refers, for example, to the class of statutory offences where the language used excludes any requirement of mens rea, so that the question whether the accused may have committed the deed intentionally, recklessly, negligently, or by mistake, is irrelevant so far as his liability to conviction is concerned. But this is not the case where murder and manslaughter are concerned.

It must be borne in mind that s. 11 relates to mistakes of fact, as is, indeed, stated by the marginal note to the section. The intention of the section would appear to be to apply the common law rules as to mistake summarised in *Russell on Crime* (11th Edn.) at p. 79 as follows:

“Mistakes can be admitted as a defence provided (1) that the state of things believed would, if true, have justified the act done; (2) that the mistake must be reasonable; (3) that the mistake relates to fact and not to law.”

We think that it is confusion between mistake of fact and mistake of law which may have given rise to difficulty in the application of s. 202. It appears to us that an accused acting under a reasonable mistake of fact, where that mistake if true would lead to the application of s. 201 of the Penal Code, is entitled to rely on that mistake. But the accused cannot rely on a mistake of law.

If this principle is applied, it will be seen that the decision in *R. v. Jehoshaphat Ruyambi Mwaniki* (1), was sound, since the mistake in question was whether the act of the deceased which provoked the accused into retaliation was accidental or intentional. This was a question of fact, and since the accused could reasonably have believed that he was the victim of an assault by the deceased, he was entitled to have the case considered on that basis.

In the instant case there was no question of mistake of fact. The mistake, if any, on the part of the appellant would have been as to the justification for the blow, which is a matter of law. The appellant was under no mistake as to the facts, and if on those facts the blow was lawful (as to which the learned judge made no definite finding) then the blow could not be any excuse for the assault.

We think, therefore, that the passage from the judgment in the instant case, which is set out above, is a misdirection, arising from a failure to distinguish between a mistake of fact and a mistake of law. The misdirection, in the event, was not material, since the learned judge held, in our view rightly, that even if the blow could be regarded as provocation, it could not excuse the method of retaliation employed by the appellant.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

MG Konstam (Crown Counsel, Tanganyika)

For the respondent:

The Attorney-General, Tanganyika

MK Bhandari v R
[1961] 1 EA 367 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	5 July 1961
Case Number:	252/1961
Before:	Sir Ronald Sinclair CJ and Pelly Murphy J

[1] *Street traffic – Parking offence – Summary procedure – Vehicle parked for longer than permitted – Ticket affixed on vehicle – Owner appears at court – Plea of not guilty – Whether court may infer that owner was driver at relevant time – Burden of proof that owner was driver at the time – Traffic Ordinance, 1953, as amended by the Traffic (Amendment) Ordinance, 1959, s. 49 (b) and s. 113 A (K.).*

Editor's Summary

The applicant was convicted under s. 49 (b) of the Traffic Ordinance, 1953, as amended, of failing to conform to a traffic sign and was fined Shs. 20/-. It was alleged by the prosecution that a car of which the applicant was the registered owner was seen parked in a “one-hour” parking area in the same place in Government Road, Nairobi, from 10.45 a.m. to 12.45 p.m. and that at 12.45 p.m. a ticket was stuck to the windscreen of the car. Under s. 113 A (4) *ibid* the ticket is a summons and under s. 113A (6) if any person so served fails to comply with it then the registered owner is liable. Accordingly the applicant as registered owner appeared before the magistrate and pleaded not guilty. After the case for the prosecution had closed the appellant submitted that there was no case to answer as there was no evidence that he was the driver at the time. When this submission was overruled the applicant elected not to call evidence. The magistrate in convicting the applicant held that it was obvious that had a person other than the owner been in charge of the vehicle such other person would have attended court on the appointed day and, since the applicant had attended, it was clear that he was in charge of the vehicle when he received the ticket. He further held, that as the applicant

was in charge, the presumption was that he had parked the vehicle. The applicant thereupon invoked the revisional jurisdiction of the Supreme Court.

Held –

- (i) it is clear that in driving a vehicle into a parking place a driver commits no offence; moreover having left the vehicle in the parking place he ceases, though perhaps temporarily, to be the driver within the meaning of s. 2 of the Traffic Ordinance, 1953.
- (ii) section 49 *ibid* is designed to place obligations on persons who are in physical control of vehicles; it cannot be interpreted as applying to a person who has driven a vehicle and left it unattended, nor was it intended to control the duration of stay of vehicles in car parks.
- (iii) even assuming that the applicant was the driver when the vehicle was driven into the parking place, he should not have been found guilty of an offence against s. 49 *ibid*.
- (iv) (*obiter*) under s. 49 (*b*) the owner of a vehicle may be “reasonably suspected” of the commission of the offence; if, however, the owner does not plead guilty in writing but attends court, he does not thereby admit that he was the driver; nor, because of his appearance in answer to the charge, can the inference be drawn that he was the driver.
- (v) the burden of proof put upon an owner to show that he was not in charge of a vehicle arises only if he fails to comply with the notification requiring him to attend court to answer the charge; if he appears in court and pleads not guilty, it is then for the Crown to prove that he was the driver of the vehicle at the relevant time and in the absence of proof he is entitled to an acquittal.

Conviction quashed and sentence set aside.

No cases referred to in judgment

Judgement

Sir Ronald Sinclair CJ: read the following judgment of the court: The applicant, who was convicted by a resident magistrate, Nairobi, of failing to conform to the indications of a traffic sign contrary to s. 49 (*b*) of the Traffic Ordinance, 1953, and fined Shs. 20/-, applies to this court in its revisional jurisdiction to quash the conviction.

The grounds upon which the applicant relies are set forth by him as follows:

- “1. The learned magistrate was wrong in law and fact in drawing the inference that the applicant must have parked the car from the fact that he appeared in the court. The applicant contends that he as an owner was obliged by law to appear.
- “2. The learned magistrate was wrong in law and fact in convicting the applicant for the offence charged without any evidence that the applicant committed the said offence.
- “3. The learned magistrate having come to the conclusion that s. 113A (6) does not raise any presumption against the applicant, was wrong in law and fact in stating that such rebuttle presumption arises under the law and applicant will contend that the circumstances were not such as to lead to the irresistible conclusion that the applicant parked the car and allowed it to be parked in excess of the permitted time. The applicant was entitled to the benefit of doubt.
- “4. There was no evidence that these were legal parking signs where the applicant’s car is alleged to have

been parked in contravention of the parking sign.

- “5. The applicant will contend that it is impossible for a driver of a vehicle to conform to a parking sign authorising parking within certain limited time (as in the present case) because once a driver has parked the car, he ceases to be the driver of the car.”

We would say at once that we see no merits in the fourth ground.

At the close of the evidence for the prosecution in the court below, the applicant made certain submissions in law and the magistrate ruled that he had a case to answer. The ruling was in the following terms:

“The prosecution have adduced evidence that on March 15, 1961, car KFZ 261 was seen parked in Government Road from 10.45 a.m. to 12.45 p.m. in the same place in a one-hour parking area. At 12.45 p.m. ticket No. 35782 was stuck to the windscreen of this car. The accused is the registered owner of this car. The court record shows that the accused on March 29, 1961, attended the court and pleaded not guilty. The case was then fixed for hearing on April 12, 1961. On April 12, 1961, it was adjourned to April 21, 1961, for enabling the prosecution to complete investigations. On April 21, 1961, the hearing of the case commenced and at the close of the prosecution case the accused made a submission as follows:

‘I am not responsible for this offence as there is no evidence that I parked the car. Section 49 (b) Traffic Ordinance, 1953, refers to the “driver” of the vehicle and not the owner. There is an amendment to the procedure by s. 113A Traffic Ordinance, 1953, which deals with minor traffic offences. Under s. 113A (3) the service of the ticket by sticking it to the windscreen was a good service upon me. Under s. 113A (4) this ticket became a summons. Under the proviso to this sub-s. (4) I could have pleaded guilty in writing and remitted the fine if I had wished to do so. Under s. 113A (6) if any person served with the notification fails to comply with it then the registered owner is held liable. I have complied with the notification by presenting myself in court and pleading not guilty. Therefore this sub-section does not apply to me at all. It only applies to those persons who fail to comply with the ticket. The whole of sub-s. (6) only applies to such persons. The owner under this sub-section is liable unless he shows that he was not in charge of the vehicle at the relevant time and he shall have satisfied the court that he has given all information at his disposal to the police or to the court to enable the person who was in charge at the time to be summonsed.

‘Section 113A (6) does not raise any presumption against the owner except in the case when the person served with the ticket does not appear.

‘In this case the prosecution should have proved that I was the person responsible for parking and liable under s. 49 (b) Traffic Ordinance, 1953. They have not done so. I am entitled to be acquitted.’

“The accused put forward his submission very ably and the court is in complete agreement with it except that it is not correct to say that there is no evidence against the accused that he was responsible for parking the vehicle in question. It is true that there is no direct evidence that the accused parked the car but on a proper view of the evidence a rebuttable presumption arises that he did park it. The vehicle was parked from 10.45 a.m. to 12.45 p.m. The accused received service of the ticket after it was stuck to the windscreen of the vehicle at 12.45 p.m. He is the owner of the vehicle and was in charge of the vehicle when he received the service of the ticket. He himself appeared in court for answering the charge on the

ticket. In these circumstances it is reasonable to presume that the accused who was in charge of the vehicle after 12.45 p.m. was also in charge of it before 10.45 a.m. and parked it. It is, of course, possible that some borrower of the vehicle was responsible for parking it but this possibility would appear to be ruled out in view of the fact that the accused himself appeared in court to answer the charge. Had someone else parked the vehicle the accused would have seen to it that someone else appeared in court to answer the charge. Had that someone else not obliged by doing the needful, the accused would then have placed the facts before the police and provided them with the name and address of that someone. The court, accordingly, rules that a case has been made out sufficiently to require the accused to make his defence.”

It would appear that, after that ruling, the applicant made no further submissions and did not call evidence. The magistrate thereupon delivered the following judgment:

“The accused is charged as follows:

“Offence 9: failure to conform to indication on a traffic sign (including parking sign) contrary to s. 49 (b) and s. 64 of the Traffic Ordinance, 1953, in that on March 15, 1961, between the hours of 10.45 a.m. to 12.45 p.m. in Government Road outside Choitram’s parked his car KFZ 261 over the official parking time of one hour.

“The only evidence before the court is that of the two prosecution witnesses called. It establishes that the accused is the registered owner of vehicle KFZ 261 and that on March 15, 1961, this vehicle was seen parked in Government Road from 10.45 a.m. to 12.45 p.m. a ticket No. 35782 was stuck to the windscreen of the car requiring the owner or person in charge of this vehicle to attend at the Traffic Court on March 29, 1961.

“The accused has attended the court on March 29, 1961, in answer to this ticket.

“The accused has argued that the only evidence is that he is the owner of the vehicle. He argues that there is no evidence that he was either in charge of the vehicle after 12.45 p.m. or before 10.45 a.m.

“Now it is obvious that had a person other than the owner been in charge of the vehicle he, such other person, would have attended the court on March 29, 1961. As the accused attended it is clear that he was in charge of it when he received service of the ticket. He, of course, also happens to be the owner. He being in charge the presumption arises, in all the circumstances of the case, that he had himself parked the vehicle as the court has already stated in the ruling given on the submission for no case to answer.

“The accused is, accordingly, convicted of failure to conform to indication on a parking sign contrary to s. 49 (b) Traffic Ordinance, 1953, as charged.”

It is to be noted that the charge did not allege that the applicant was the driver of the car in question. The relevant part of s. 49 of the Traffic Ordinance, 1953 reads:

“The driver of a vehicle shall at all times:

(b) conform to the indications given by any traffic sign.”

Section 2 of the Ordinance defines the expression “driver” (in relation to vehicle) as any person who drives or guides or is in actual physical control of any vehicle on any road. It is not in dispute that the vehicle in question was,

at the relevant time on a road as defined in the same section. “Traffic signs” are also defined in that section and it is not seriously disputed that the sign referred to in the charge was a traffic sign. The sign in question was one which restricted the parking of vehicles at the place in question to a maximum period of one hour.

Crown Counsel did not support the conviction in view of the fact that it had not been proved that the applicant was the driver of the vehicle. In view of the fact that the matter is of some public importance we have thought it desirable to state at some length our reasons for saying that the conviction must be quashed.

There appear to be two real points for decision:

1. Was it proved, or could it be inferred, that the applicant drove the vehicle into the parking place and therefore was the driver at that time?
2. Assuming that it had been established that the applicant was the driver when the vehicle was driven into the parking place, was he guilty of an offence against s. 49 (b) of the Traffic Ordinance, 1953, when he did not remove it within the prescribed period?

To deal first with the second point. This question may be put in another way—did the person who was the driver at the time when the vehicle was driven into the parking place cease to be the driver, when he left it in the parking place?

It is clear that in driving the vehicle into the parking place the driver commits no offence. We think, however, that, having left the vehicle in the parking place, he ceased, though perhaps temporarily, to be the driver within the meaning of the definition. We are of opinion that s. 49 of the Ordinance is designed to place obligations on persons who are in physical control of vehicles and that it cannot be interpreted as applying to a person who has driven a vehicle and left it unattended. As to this, compare the provisions of s. 50 (3) and s. 63 of the Ordinance. It seems to us clear that s. 49 (b) was never intended to control the duration of stay of vehicles in car parks. In England special provision is made (albeit in relation to parking places where charges are made) under s. 21 of the Road Traffic Act, 1956, to make clear that the driver who parks a vehicle is liable for parking in excess of the prescribed period even though he has ceased to be in control of the vehicle.

We think that the applicant, even assuming that he was the driver when the vehicle was driven into the parking place, should not have been found guilty of an offence against s. 49 (b) of the Ordinance.

Having arrived at that conclusion, it is unnecessary to decide the other point raised in this case. But as it is one of fundamental importance to the administration of the Ordinance we think it proper to express our views upon it.

In general, the Ordinance, where it is sought to make someone other than the driver responsible for acts or omissions regarding the user of vehicles, speaks of “any person”.

In the instant case the proceedings were instituted under the provisions of s. 113A. Sub-section (3) of that section provides that a notification of a minor traffic offence may be served by affixing it to the vehicle. Such service is deemed to have been effected upon

“the owner of person in charge . . . who is reasonably suspected of having committed any of the scheduled minor offences”.

In the case of an act which relates to parking and which is allegedly a contravention of s. 49 (b) of the Ordinance we think that the owner of the vehicle may be “reasonably suspected” of the commission of

the offence. If, however, the owner does not plead guilty in writing but attends court, he does not, in our opinion, thereby admit that he was the driver. Nor do we think that,

because of his appearance in answer to the charge, the inference can be drawn that he was the driver. On the contrary, by virtue of sub-s. (6) of s. 113A, if he does *not* attend he is deemed to be guilty of the offence. Under the procedure which the section prescribes, the owner, unless he wishes to plead guilty in writing, is required to attend court to answer the charge. If he does so and, when charged, pleads not guilty, he puts all the elements of the charge in issue. The burden of proof put upon the owner to show that he was not in charge arises only if he fails to comply with the notification requiring him to attend court to answer the charge.

In this case the owner appeared in court and pleaded not guilty. In our opinion it was then for the Crown to prove that he was the driver of the vehicle at the relevant time. If, as happened here, the Crown fails to prove this, the owner is entitled to be acquitted.

The conviction is quashed and the sentence set aside. The fine, if paid, is to be refunded.

Conviction quashed and sentence set aside.

The applicant in person.

For the respondent:

D de F Stratton (Crown Counsel, Kenya)

For the applicant:

Advocates: *Bhandari & Bhandari*, Nairobi

For the respondent:

The Attorney-General, Kenya

**Michael Muzinga and another v Samson Ruburwa Rusoke and his Highness
the Omukama of Toro**
[1961] 1 EA 372 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	2 June 1961
Case Number:	1224/1960
Before:	Sheridan J

[1] *Native law and custom – Powers of ruler – Dismissal of elected councillors – Legislation providing for election of councillors and duration of appointment – Whether legislation supersedes customary power of ruler to dismiss members of council – Administration (Incorporation) Ordinance (Cap. 73), (U.) – Toro District Council Regulations (L.N. 168 of 1949), reg. 5, reg. 8, reg. 9, reg. 11 (U.) – African Local Governments Ordinance (Cap. 74), s. 2, s. 6, s. 7 and s. 9 (U.) – African Administration Ordinance (Cap. 73), s. 3, s. 4, s. 8 (U.) – Limitation Ordinance, 1958 (U.) – Civil Procedure Rules, O. 2, r. 7 (U.) –*

Editor's Summary

In January, 1959, the two plaintiffs were elected by the Burakya Saza Council and Kyaka Saza Council respectively to be members of the Rukurato of Toro. In April, 1960, they wrote a letter to the Minister of Local Government of the Uganda Protectorate alleging misappropriation and mishandling of public funds by officials and chiefs of the Toro Government. At a meeting of the Rukurato in May, 1960, the Katikiro of Toro had the letter read out to the Rukurato which expressed indignation at the allegations and resolved that having no confidence in the plaintiffs they should be reported to the Omukama for dismissal from the Rukurato. The Omukama, claiming the right to do so according to the traditions and customs of the tribe, duly dismissed them whereupon the plaintiffs filed a suit in the High Court of Uganda claiming a declaration that they were still and at all material times had been members of the Rukurato and an injunction to restrain the first defendant, as Katikiro of Toro and Chairman of the Rukurato, and other members of the Rukurato

from preventing them from acting as members. By an order of the court permission was granted to the plaintiffs under Civil Procedure Rules, O. 1, r. 8 to sue the first defendant on behalf of all the members of the Rukurato, and in that capacity he was also the third defendant. The defence of the first defendant averred that in view of the African Administration (Incorporation) Ordinance the suit against him either in his personal or representative capacity was misconceived and not sustainable in law and that whilst admitting the resolution of expulsion this was effected by an order made by the Omukama, the second defendant, in accordance with Toro native law and custom. It was argued for the plaintiffs that the Toro District Council Regulations brought about major changes and that, *inter alia*, the object of the regulations was to protect elected councillors who were to continue in office for the life of the Rukurato unless disqualified. It was also submitted that the great changes made by the regulations were incompatible with the exercise by the second defendant of his customary powers, at least as far as elected councillors were concerned. Section 9 (2) of the African Local Governments Ordinance, provides that nothing in the Ordinance shall be deemed to repeal or revoke any native law made under the Native Law Ordinance or not, and counsel for the defendants contended that this section preserved the second defendant's power to expel members from the Rukurato by Toro native law and custom.

Held – the Omukama had power under Toro native law to expel members of the Rukurato, this power had been exercised in the past, it was preserved by s. 9 (2) of the African Local Governments Ordinance and accordingly the suit must fail.

Judgment for the defendants.

No cases referred to in judgment

Judgment

Sheridan J: By an amended plaint the two plaintiffs, who were elected members of the Toro District Council, claim (a) a declaration that they are and have at all material times been members of the council, (b) an injunction to restrain the first defendant and other members of the council from preventing them from acting as members of the council. The council is more usually referred to as the Rukurato, and I shall do the same. Mr. Samson Rusoke (D.W. 1), the first defendant, is the Katikiro of Toro. His Highness the Omukama of Toro has been made the second defendant and, by an order of the court dated May 9, 1961, permission was granted under the Civil Procedure Rules, O. 1, r. 8, to the plaintiffs to sue the first defendant on behalf of all the members of the Rukurato. In that capacity he is the third defendant. He is the chairman of the Rukurato.

The amended written statement of defence of the first defendant, so far as it is now relied on, avers (1) that, relying on the provisions of the African Administration (Incorporation) Ordinance (Cap. 73), the suit against him, either in his personal or representative capacity, is misconceived and not sustainable in law, (2) that whilst admitting that on May 7, 1960, the Rukurato passed a resolution that the plaintiffs should be expelled this was effected by an order made on May 12, 1960, by the second defendant in accordance with Toro native law and custom. The written statement of defence of the second defendant is to the same effect. I will refer to the first and second defendants as the Katikiro and the Omukama respectively.

In January, 1959, in accordance with the Toro District Council Regulations (L.N. 168 of 1949) Michael Muzinga (P.W. 1), the first plaintiff, was elected an elected member of the Rukurato by the

Burakya Saza Council and Samson Katemba (P.W. 2), the second plaintiff, was similarly elected by the Kyaka Saza Council, for a period of three years. They composed a letter dated April 25, 1960 (exhibit "A. 1") addressed to the Minister of Local Government at

Entebbe, with a copy to the Rukurato Chairman Kabarole. It contained serious allegations of misappropriation and mishandling of taxpayers' money by officials and chiefs of the Toro Native Government and it called for an inquiry into the public works section. At a meeting of the Rukurato on May 6, 1960, the Katikiro called upon a member to read it out. When this was done considerable indignation was expressed by all the members, except the plaintiffs, because (a) the matters complained of had not been discussed before, and (b) they had been taken to Entebbe instead of being first discussed in the Rukurato. I accept the defence evidence on this. The sequence of events then becomes somewhat confused, but I think the clearest picture is given by Lazaro Basigara (D.W. 2), a seventy-three old member of the Rukurato. The second plaintiff sought to discuss the matters but he was not allowed to. The first plaintiff kept silent. After an hour's debate in which all the other members participated the Katikiro took a message to the Omukama. He returned to say that the Omukama would defer making a decision until he had seen the minutes. The plaintiffs who were very annoyed at what had happened, thereafter absented themselves from the Rukurato. Later the second plaintiff came to apologise for his mistake but his apology was not accepted as he had not come with the other writer of the letter—the first plaintiff. There is no suggestion that the plaintiffs were forcibly ejected from the meeting or that they were similarly prevented from attending subsequent meetings. A few days after May 6 the Rukurato passed the following resolution as recorded in the minutes:

“The Rukurato after being submitted with a letter which was written by the two members of the Toro Rukurato to the Minister of Local Government defiling Rukirabasaija Omukama's Government's name, the Rukurato has no confidence in them. And, the Owekitiinisa Katikiro was requested to report them to Rukirabasaija the Omukama to dismiss them from the Rukurato.”

By letter dated May 11 (exhibit “A. 3”) the Katikiro reported the matter to Omukama. Although it uses the past tense in saying that the plaintiffs “have been dismissed” it is now agreed on all sides that only the Omukama could exercise this power, if it still existed, and, as the Katikiro put it, if the Omukama had refused to accept the Rukurato's “decision” to dismiss the plaintiffs they would have continued to be members. On May 12 the Omukama wrote to the Katikiro in the following terms:

“In reply to your letter No. ADM. 13 of May 11, 1960. I also confirm the dismissal of M/s. A. Muzinga and S. Katemba according to the traditions and customs of my tribe and according to the decision of the Parliament of Toro Kingdom.”

Mr. Troughton, for the plaintiffs, concedes that if the power to expel exists in the Omukama, it was not improperly exercised.

Two new members have been elected to fill the vacancies left by the plaintiffs' expulsion.

A volume of evidence was led to establish that prior to 1949 the Omukama, in at least five or six specified cases, had expelled members from the Rukurato and from their chieftainships for disobedience, despising him or the Katikiro, or for unauthorised disclosure of Rukurato secrets. Hamu Rwomiire, one of these members who was dismissed in 1928, is said to have appealed, unsuccessfully, up to the Eastern African Court of Appeal. No one has been able to trace any record of this case so it cannot be said whether he was dismissed as a chief or as a member of the Rukurato or as both. The existence of this power to expel members of the Rukurato prior to 1949 was virtually unchallenged but Mr. Troughton, for the plaintiffs, points out that in those

days the Rukurato consisted only of ex-officio members with Saza, Gomborra and Muluka chiefs as members, and he concedes that the Omukama, as chairman, could expel them as chiefs. He contends that in 1949 two major changes took place (1) it was provided that the Katikiro should be chairman of the council (reg. 5 of the Toro District Council Regulations), (2) the manner of electing elected councillors was prescribed (reg. 8). The Regulations further provide:

“9. Every nominated and elected councillor shall serve on the council until it is dissolved but may be reappointed or re-elected to the council.

.....

“11. No person shall continue to serve as a councillor who:

- (a) ceases to live in the district;
- (b) is sentenced to imprisonment;
- (c) is certified insane;
- (d) ceases to hold any qualification in respect of which he was nominated to the council.”

He submits that the object of these two regulations was to protect elected councillors. They were to continue in office for the life of the council unless they were disqualified. He says that the great differences made by the Regulations are incompatible with the exercise by the Omukama of his customary powers—at least as far as elected councillors are concerned. That may have been the intention of the Regulations but it remains to be seen whether it has been carried into effect and whether it can stand up to the parent legislation which is the African Local Governments Ordinance (Cap. 74), s. 6. That section provides:

“6.(1) The Governor may, by proclamation, establish in any area in the Protectorate a district council, and shall proclaim the name and style by which such council shall be known.

“(2) The Governor may prescribe by regulations the following matters in relation to any council proclaimed under sub-s. (1) of this section:

- (a) the constitution of the council;
- (b) the appointment or election of members of the council;
- (c) the manner in and reasons for which membership of the council shall be terminated;
- (d) the periodic dissolving of the council or parts of it;
- (e) the powers and duties of the council;
- (f) the frequency of the sittings of the council and the procedure whereby and manner in which the council shall conduct its business including the number of members that shall constitute a quorum of the council.

“(3) Every council established under sub-s. (1) of this section shall make its own ‘standing orders’ in the manner prescribed by the Governor, but such standing orders shall not be repugnant to any regulations made under sub-s. (2) of this section.

.....

“(7) The Governor may in regulations made under sub-s. (2) of this section provide for penalties for the breach of the provisions of any such regulations.”

Under sub-s. (3) standing orders exist only in draft as they have not been agreed between the Toro and the Protectorate Governments. As regards sub-s. (7) no penalties have been provided in the Regulations for the breach of any of their provisions.

Mr. Dingle Foot, for the defendants, relies heavily on s. 9 (2) of the Ordinance which provides:

“(2) Nothing in this Ordinance shall be deemed to repeal or revoke any native law whether made under the Native Law Ordinance or not.”

The Native Law Ordinance was Cap. 115 of the 1935 edition of the Laws of Uganda which, *inter alia*, empowered any native council, by resolution, to alter native law. The Omukama’s power to expel members from the Rukurato by Toro native law and custom—and to my mind it was undoubtedly such a law or custom—existed independently of this Ordinance. The question is whether by virtue of s. 9 (2) of the African Local Governments Ordinance it was preserved. The preamble to the Ordinance reads as follows:

“Whereas the authority of the Mukama of Bunyoro-Kitara, the Mukama of Toro and the Mugable of Ankole has been recognised in agreements:

“And whereas such rulers are customarily advised by their councils:

“And whereas throughout the remainder of the Protectorate, other than in Buganda where other provision has been made, district councils have from time to time been established:

“And whereas in order to devolve greater responsibility upon African local authorities it is considered desirable to reconstitute such councils, to increase their powers in matters of local government and to define their position in relation to the administration of the Protectorate:

“Be it therefore enacted by the Governor of the Uganda Protectorate, with the advice and consent of the Legislative Council thereof.”

From this it appears that the traditional Toro Rukurato was to continue in being. It was to be reconstituted; its powers were to be increased and it was clothed with certain statutory powers. If there is any conflict between s. 9 (2) of the Ordinance and regs. 9 and 11 of the Regulations then s. 9 (2) must prevail, but I do not think that there is any such conflict. Regulation 9 merely places an obligation on the councillors to serve on the council until it is dissolved and while reg. 11 sets out the disqualifications it does not say that there is no other way in which a councillor can cease to serve. I am satisfied that the Omukama had power to expel members of the Rukurato under Toro native law, that it was exercised in the past and that it was preserved by s. 9 (2) of the African Local Governments Ordinance. For this reason alone, in my view, the suit must fail.

Judgment for the defendants.

For the plaintiffs:

JFG Troughton

For the defendants:

Dingle Foot QC (of the English Bar), and *PN Ponda*

For the plaintiffs:

Advocates: *Hunter & Greig*, Kampala

For the defendants:

Shavkat Virji, Daphtary & Co, Kampala

Hypolito Cassiano De Souza v Chairman and Members of the Tanga Town Council
[1961] 1 EA 377 (CAD)

Division: Court of Appeal at Dar-Es-Salaam
Date of judgment: 6 April 1961
Case Number: 89/1960
Before: Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA
Appeal from: H.M. High Court of Tanganyika–Murphy, J

[1] *Certiorari – Local government – Application to quash committee's recommendation for dismissal of employee – Procedure provided by Council's Staff Regulations not observed – Tanganyika Order-in-Council, 1920, s. 17 (2) (T.) – Local Government Ordinance (Cap. 333), s. 134 and s. 135 (T.) – Tanga Town Council Staff Regulations, reg. 10.*

[2] *Mandamus – Local authority – Recommendation by committee for dismissal of employee – Committee sitting privately for discussion with complainants before hearing employee – Employee not informed of specific allegations against him – Application by appellant for mandamus – Need to hear and determine staff appeal in accordance with principles of natural justice – Tanganyika Order-in-Council, 1920, s. 17 (2) (T.) – Local Government Ordinance (Cap. 333), s. 134 and s. 135 (T.)–Tanga Town Council Staff Regulations, reg. 10.*

Editor's Summary

A complaint was made by two councillors against the appellant who was at one time an acting firemaster employed by the Tanga Town Council. One of the complainants was the chairman of the Traffic, Fire, Lighting and Police Liaison Committee and the allegation against the appellant was that a fireman had been found during his normal working hours in an outbuilding in the appellant's house in circumstances which indicated that he was employed as a personal servant of the appellant and not upon his proper duties. The complaint was made to the assistant engineer who was at the time in charge of the department controlling the Fire Brigade. The complaint against the appellant was investigated by the town clerk who made a report to the Committee at which one of the complainants presided. The appellant was summoned and informed by the Committee of the allegations and was asked to reply. The assistant engineer was also present. After hearing the appellant, the Committee resolved to suspend the appellant from duty and recommended to the Town Council that, subject to any recommendation of the Finance Committee on appeal by the appellant, he be dismissed from service. Subsequently, the appellant and his advocate were called to attend the Finance Committee which was entrusted with the hearing of appeals under reg. 10 (d) of the Staff Regulations. They were kept waiting for more than fifteen minutes while the Finance

Committee held a private discussion at which both the complainants were present although they were not members of the Finance Committee. No disclosure was made to the appellant or his advocate of the nature of the discussion but from the town clerk's affidavit the discussion was said to be for the purpose of setting any preliminary points regarding the procedure to be adopted at the hearing. When the hearing commenced, the appellant's advocate asked for particulars of the charges against his client but was told that his client had already been informed of these and the Committee refused to give him any further information. The appellant's advocate then asked for and obtained leave to withdraw and did so. The Committee continued with the hearing and recommended the appellant's dismissal, which was confirmed by the Council. Under the Staff Regulations of the Council it is provided that the officer in

charge of each department is responsible for discipline, that any complaint of misconduct is to be investigated by that officer who can suspend any member of his staff for gross misconduct, and that if a committee resolves to relegate or dismiss an officer, its proposal has to be conveyed to the employee by a letter signed by the town clerk stating the grounds on which the proposed action was based; that on receipt of the letter the employee could appeal to the Finance Committee and that the report of that Committee must be submitted to the Council for appropriate action. The appellant applied to the High Court for writs of certiorari and mandamus asking that the recommendation of the Finance Committee be quashed and that the Committee be directed to hear his appeal in accordance with the principles of natural justice. The application was refused and the trial judge held that the Staff Regulations did not provide for any judicial or quasi-judicial proceedings at first instance, that what the Finance Committee had to hear was an appeal, that it was not incumbent on the Committee to take evidence, and that it could obtain information in any way thought best, provided a fair opportunity is given to the parties to correct or contradict any relevant and prejudicial statement. The appellant thereupon appealed with the leave of the trial judge.

Held –

- (i) reg. 10 of the Staff Regulations contemplated that the suspension of an employee should be by the officer in charge of the department after consultation with the town clerk, the suspension to be followed by a report to the appropriate committee; it did not empower the Committee to suspend an employee but it could propose relegation or dismissal and such disposal was to be conveyed to the employee by the town clerk by letter stating the grounds for the proposed action.
- (ii) the hearing before the Finance Committee was clearly a judicial or quasi-judicial proceeding and while there was no objection whatever to discussion of the matter beforehand in private and arranging procedure, it was objectionable, though not of itself fatal, that the complainants should be closeted with the Finance Committee for fifteen minutes before the appellant was admitted; it was immaterial that their presence may not have influenced the decision.
- (iii) it was difficult to conceive why any tribunal which intended fairly to listen to both sides, would not give some information to an appellant whose advocate said he was embarrassed by not knowing the precise case which he had to meet;
- (iv) reg. 10 of the Staff Regulations had not been complied with and the principle of natural justice that a fair opportunity must be given to contradict any statement prejudicial to the view of a defendant was contravened also, since the appellant did not sufficiently know what the case against him was at that stage.

Appeal allowed. Certiorari granted to bring up and quash the decision of the Finance Committee and the decision of the Council dismissing the appellant. Mandamus granted addressed to Chairman and Members of Tanga Town Council directing them to hear and determine the complaint against the appellant in accordance with the provisions of the Staff Regulations and principles of natural justice.

Cases referred to:

- (1) *Board of Education v. Rice and Others*, [1911] A.C. 179.
- (2) *Local Government Board v. Arlidge*, [1915] A.C. 120.
- (3) *R. v. Electricity Commissioners*, [1924] 1 K.B. 171.

- (4) *University of Ceylon v. Fernando*, [1960] 1 All E.R. 631.
- (5) *De Verteuil v. Knaggs*, [1918] A.C. 557.
- (6) *R. v. Agricultural Land Tribunal ex parte Bracey*, [1960] 1 W.L.R. 911; [1960] 2 All E.R. 518.

- (7) *Errington v. Minister of Health*, [1935] 1 K.B. 249.
- (8) *B. Johnson & Co. (Builders) Ltd. v. Minister of Health*, [1947] 2 All E.R. 395.
- (9) *Byrne v. Kinematograph Renters Society Ltd.*, [1958] 2 All E.R. 579.
- (10) *General Medical Council v. Spackman*, [1943] A.C. 627.

April 6. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal brought with leave of the High Court of Tanganyika against a judgment and order of that court dated July 26, 1960, dismissing an application by the appellant for writs of certiorari and mandamus. The jurisdiction to grant prerogative writs is conferred by s. 17 (2) of the Tanganyika Order-in-Council, 1920 and these writs have not in Tanganyika, as they have in certain other jurisdictions, been replaced by Orders. The appellant was at one time an acting firemaster employed by the Tanga Town Council. He sought to have (i) a writ of certiorari issued to the chairman and members of the Tanga Town Council to remove into the High Court and to quash a recommendation of the Finance Committee of that Council, sitting as an appeal committee under Staff Regulation No. 10 of the Tanga Town Council Staff Regulations, dismissing an appeal by the appellant against a proposal formulated for his dismissal from duty and a decision of the Council accepting the recommendation and dismissing the appellant from the Council's service; and (ii) a writ of mandamus directed to the Committee requiring it to hear and determine the appeal of the appellant in accordance with the principles of natural justice.

The Tanga Town Council derives its existence and authority from the Local Government Ordinance (Cap. 333 of the Laws of Tanganyika). Staff Regulations have been made under s. 135 of that Ordinance. Under that section a Town Council may, with the prior approval of the member, now the Minister for Local Government, make regulations for the purposes *inter alia* of maintaining discipline and regulating dismissals.

Regulation 10 reads as follows:

"Discipline

- "(a) The officer in charge of each department shall be responsible to the Council for the management and discipline of his department.
- "(b) The officer in charge of a department shall investigate any case of alleged misconduct by an officer of his department and if he considers that disciplinary action should be taken, he shall report the case to the town clerk for submission to the Council.
- "(c) An officer in charge of a department, after consultation with the town clerk may suspend any member of his staff for gross misconduct and such action shall be reported forthwith to the appropriate Committee. Whenever it is proposed by the appropriate Committee to relegate or dismiss an officer (except for a criminal offence for which he has been prosecuted and convicted) such proposal when formulated shall be conveyed to the officer concerned by a letter over the signature of the town clerk, stating the grounds upon which the proposed action is based.
- "(d) Upon receipt of such communication, the officer concerned may appeal either individually or through his representative to the Committee of the Council entrusted with the hearing of appeals and shall have the right of appearing with or without his representative before such a Committee at his option.

“(e) The report of such appeals committee shall be submitted to the Council who shall thereupon decide whether to accept, amend, or reject the original proposal.”

It will be observed that under para. (a) the officer who is responsible to the Council for the discipline of his department is the officer in charge of the department; and under para. (b) the person to investigate any case of alleged misconduct by an officer of his department is the officer in charge of the department and upon him is cast the duty of reporting the case to the town clerk for submission to the Council. Again under para. (c) it is the officer in charge of the department, after consultation with the town clerk, who is empowered to suspend a member of his staff for gross misconduct and such action is to be reported to the appropriate committee. It would seem that the report should be by the officer in charge of the department since, apparently, the town clerk's function is consultative merely. When the committee proposes to relegate or dismiss an officer (except after conviction of a criminal offence) such proposal when formulated is to be conveyed to the officer by a letter over the signature of the town clerk, stating the grounds upon which the proposed action is based.

It is plain: (1) that the person responsible for the discipline of a department is the officer in charge of that department; (2) that any case of alleged misconduct is to be investigated by the officer in charge of the department; (3) that suspension for gross misconduct is to be done by the officer in charge of the department. The town clerk is only empowered: (i) under para. (b), to receive a report from the officer in charge of the department for submission to the Council; (ii) under para. (c) to consult with the officer in charge of the department before suspension of a member for gross misconduct; and (iii) to sign the letter conveying the proposal for dismissal and the grounds therefor to the member. The town clerk is not empowered by Staff Regulation 10 to investigate cases of alleged misconduct in departments of which he is not in charge. I think that the requirements contained in paragraph (c) that the grounds upon which the proposed action is based shall be conveyed to the officer concerned followed immediately by a provision (para. (d)) that upon receipt of such communication the officer concerned may appeal indicates that the intention is that he shall be given all such information as to the grounds of the proposed action as will enable him to formulate his appeal. And it is plain that there must be a sufficient communication not merely of the original accusations (which he should know), but “of the grounds upon which the proposed action” of the Committee to relegate or dismiss him “is based”.

I take the facts of the present case from affidavits (dated respectively July 5, 1960, and June 9, 1960) of Mr. Jobson, the town clerk of Tanga Town Council, and Mr. Donaldson an advocate who represented the applicant before the Finance Committee which heard the appeal and in the High Court and this court. The facts which except in one or two particulars are not seriously in dispute may, so far as relevant, be summarised as follows:

The assistant engineer was at the material time the officer in charge of the department controlling the Fire Brigade. The appropriate committee for Fire Brigade affairs was the Traffic, Fire, Lighting and Police Liaison Committee (hereinafter referred to as “the Traffic and Fire Committee”). On March 24, 1960, the town clerk was conferring with the assistant engineer in the latter's office when two Asian councillors, one of whom was the chairman of the Traffic and Fire Committee, came in. They reported to the assistant engineer that a fireman by name Saidi Ali had been found during his normal working hours in an outbuilding in the appellant's house in circumstances which indicated that he was being employed as a personal servant of the appellant and not upon his proper duties. The town clerk's affidavit continues:

- “4. That after conferring with the assistant engineer and the said councillors, it was agreed that I should make further enquiries into this matter, in consultation with the assistant engineer.”

The affidavit goes on to say that later, on the same day the town clerk interviewed Saidi Ali and a team leader, Karonga Abdallah, and said that Saidi Ali told the town clerk that he had, for about two months, regularly worked in the appellant's compound and that this work included keeping the garden tidy, looking after chickens and washing the appellant's personal clothing. Karonga Abdallah told the town clerk that he had been instructed by the appellant to send Saidi Ali to do this work. The appellant was not present at that interview. Later, on the same day, the town clerk saw the appellant and related to him the statements made by Saidi Ali and Karonga Abdallah and asked him to give him (the town clerk) a reply. On March 24, the appellant sent a letter to the town clerk through the town engineer in which he said:

“Reference your conversation today regarding an alleged complaint of my misusing Fire Brigade personnel I wish to state that I have never used any one of them for my personal use.

“In order to keep the firemen busy, I had been instructed by the town engineer (Mr. Arnold) to give them guard duties, fatigue duties and drills, which I in turn have handed these instructions to senior team leader Karonga Abdallah to comply with.”

On April 23, the town clerk again interviewed Saidi Ali and team leader Karonga Abdallah. On this occasion the appellant was present and was permitted to put questions to Saidi Ali and Karonga Abdallah, who are said to have made statements similar to those made on March 24 to the town clerk. According to the affidavit of the town clerk, the appellant did not deny that Saidi Ali and certain other firemen, one of whom was named, had worked within the compound of his house, but he limited their work to cutting fences, weeding grass and cleaning the yard. The town clerk's affidavit avers that the Council had not at any time authorised the employment of firemen in the way described, and reference was made to a general instruction issued on June 24, 1959. This instruction *inter alia* forbids any officer of the Council to:

“take into his personal employment on any full time, part time or casual basis, for any kind of consideration whatsoever, any person for the time being employed by the Council”.

This appears to be a prohibition against taking Council employees into the employment of an officer for consideration. This is not precisely the ground upon which the proposal to dismiss the appellant was eventually formulated.

A meeting of the Traffic and Fire Committee was held on April 26, 1960 at which the assistant engineer was present. This Committee met under the chairmanship of one of the original complainants. The town clerk reported to this Committee the substance of his interviews above mentioned. At that meeting the appellant was informed that it was alleged that he had used Saidi Ali and other firemen as his personal servants and he was asked to reply to these allegations. The appellant replied that certain firemen were from time to time given duties to clear the grass and cut hedges in the compound of his house, but that such duties were within the term “fatigue duties” to keep firemen busy who would otherwise have had no work to do. After hearing the appellant, the Traffic and Fire Committee gave further consideration to the matter and, not being satisfied with the appellant's replies, resolved that he be suspended from duty and recommended to the Council that, subject to the recommendations of the Committee hearing any appeal by the appellant, he be dismissed from the service in accordance with the Staff Regulations. Presumably

the Traffic and Fire Committee intended to act under para. (c) of Staff Regulation 10. That regulation, however, contemplates that the suspension of a member of a department shall be by the officer in charge of the department after consultation with the town clerk, the suspension to be followed by a report to the appropriate committee. It does not empower the committee to suspend a member, though the committee may propose to relegate or dismiss him and such proposal is to be conveyed to him by a letter signed by the town clerk stating the grounds upon which the proposed action is based. The Council has a power of interdiction under s. 134 of the Local Government Ordinance, but it is not suggested that there was any interdiction by the Council.

In purported accord with the last mentioned requirement of reg 10 (c), a letter was written and signed by the town clerk and sent to the appellant on April 28, 1960. That letter read:

"I am directed to inform you that the Traffic, Fire and Lighting Committee, having made enquiries into allegations that you have knowingly permitted certain members of the Fire Brigade Staff, and in particular Saidi Ali, to be absent from their proper duties, and that you have knowingly permitted such members of the Fire Brigade to be engaged upon duties in, and about your personal household, whilst paid by the Council, the Committee are satisfied that these allegations are true.

"2. The Committee on these grounds, have formulated a proposal that you be dismissed from the Council's Service.

"3. You may appeal against this proposal if you wish to do so.

"4. You should inform me within fourteen days whether you wish to appeal or not, and if you do wish to do so, you should indicate generally, the grounds upon which your appeal is based. You will then be given an opportunity either by yourself, or by a representative, of appearing before the committee appointed to hear the appeal.

"5. In the meantime, you are suspended from duty from the morning of April 29, 1960, and you will not, except by resolution of the Council, receive salary for the period of suspension.

"6. During suspension, you must not enter upon the Fire Station premises, and the town engineer will arrange for someone to take over your duties.

"7. Please acknowledge receipt of this letter."

A reply to the town clerk's letter was written on May 11 by Messrs. Donaldson and Wood, the appellant's advocates, notifying the town clerk that the appellant intended to appeal and setting out the grounds of appeal as under:

"(1) that our client has not been guilty of gross misconduct for the purpose of reg. 10 (c) of the Staff Regulations;

"(2) certain township officials acted with grave irregularity in making out a case against our client."

On May 30, 1960, the appellant and his advocates Mr. Donaldson and Mr. Dave attended upon the Finance Committee of the Town Council, which was apparently the Committee of the Council entrusted with the hearing of appeals under reg. 10 (d) of the Staff Regulations. I will refer to this as "the Appeals Committee". The appellant and his advisers were kept waiting for more than fifteen minutes while the Appeals Committee held a discussion in their absence. The chairman of the Traffic and Fire Committee and the other original complainants were present with the Appeals Committee (though not as members of it) during this period. No disclosure was made to the appellant or to his solicitor of the nature of the discussion; but it appears from the affidavit of

the town clerk, who was also present at this meeting of the Appeals Committee, that the discussion was for the purpose of settling any preliminary points regarding the procedure to be adopted at the hearing.

Mr. Donaldson then informed the Committee that he was instructed that certain Council members had conducted an investigation against the appellant following a complaint secretly made to them by a subordinate of the appellant. It was alleged that this procedure was irregular. This was not made a ground of complaint before us. I see no reason why a member of the Council who receives such a complaint should not make some enquiries to see if it appears to have substance and whether he would be justified in reporting the matter to the proper authority.

Mr. Donaldson in his affidavit continued:

"I then asked what officer had made a report in accordance with the procedure laid down in Staff Regulation 10 . . . After a period of silence the chairman (Mr. Ravel) stated that such a report had been duly made."

Mr. Donaldson did not accept that statement and required to know who had made the report, the nature of the report, the date, the time and place where the report had been made and the names of the persons who had received the report. No answer was given. As already stated, the officer who is required to make a report under reg. 10 (b) is the officer in charge of the department. It seems that the officer who is to make the report under reg. 10 (c) is also the officer in charge of the department. In my opinion, Mr. Donaldson was within his rights in asking whether reports in accordance with Staff Regulation 10 had been made. He was entitled to know, for the purposes of his appeal, whether the requirements of the regulation had been observed. But I do not think that he was entitled to know the nature, date, time and place of these reports. He was, however, entitled to know, with sufficient particularity to enable him to meet it, the grounds upon which the proposal to dismiss the appellant was based. It does not appear from the affidavit of the town clerk that any report by the assistant engineer had, in fact, been made to the town clerk for submission to the Council under reg. 10 (b) or under reg. 10 (c) to the Committee. It was the town clerk who had carried out the investigation and who had reported to the Traffic and Fire Committee.

Mr. Donaldson's affidavit continues:

- "12. That I was then asked by the chairman to proceed with the appeal and was informed by him that it was for my client (the applicant) to disprove the allegations which had been made against him in the letter marked 'A'. I protested that such a procedure was contrary to natural justice and stated further that I was unaware of the charge which the applicant had to answer.
- "13. The town clerk then referred to the letter marked 'A' and stated that all the charges were contained therein.
- "14. I then requested that the 'certain members of the Fire Brigade Staff' referred to in para. 1 of the letter should be named. There was no reply. I then asked if I could assume that the gravamen of the charge lay only in the allegation regarding Saidi Ali. There was still no reply.
- "15. I then informed the said Committee that the applicant denied the charges against him and in order to defend him against the charges I required to be informed of the date, time and place of at least one alleged incident and the nature of the duties in and about the applicant's household which were being alleged.
- "16. One councillor then remarked 'This is not a Court of Law'

Another councillor said 'If you want to know what the charges are, ask your client. He knows all right' or words to that effect.

- "17. I then informed the said Committee that as no charge had been clearly formulated it was not possible for me to pursue the matter further and requested, and was granted, leave to withdraw."

The town clerk in his affidavit deals with these allegations as follows:

- "23. That Mr. Donaldson did say words to the effect indicated in para. 10 and para. 11 of his affidavit and in reply I said that a report had been made by two councillors to the assistant engineer but that this report had been followed by proper investigations and at each stage in these investigations the applicant was kept fully informed of the nature of any allegations made, the dates, the persons and the places involved.
- "24. That with regard to para. 12 of Mr. Donaldson's affidavit to the best of my recollection the chairman of the Committee did not say that it was for the applicant to 'disprove' the allegations which had been made. The chairman pointed out that from the letter addressed to the applicant by the town clerk on April 28, 1960, and from the statement just made by the town clerk it was evident that the applicant was fully acquainted with the allegations made against him and he had all the information which Mr. Donaldson now sought. The Committee now wished Mr. Donaldson to proceed with the appeal.
- "25. That with regard to para. 14 and para. 15 of Mr. Donaldson's affidavit I state that the information which was prior to the appeal available to the applicant and which is now referred to in this my affidavit was adequate to give Mr. Donaldson the information that he sought.
- "26. That with regard to para. 16 of Mr. Donaldson's affidavit, one or two members of the Committee spoke in an endeavour to make it clear that they were prepared to hear an appeal.
- "27. That Mr. Donaldson then concluded that he could not proceed with his appeal and, with the applicant and Mr. Dave withdrew from the meeting.
- "28. That the Committee then gave further consideration to this matter. The Committee reviewed the manner in which the applicant had been informed of the allegations against him both before the town clerk and the Traffic, Fire, Lighting and Police Liaison Committee, and the opportunities given to the applicant on these occasions to refute these allegations. The Committee was of the opinion that the applicant had had proper opportunities but had failed adequately to refute the allegations made. The Committee considered the grounds of appeal set out in Mr. Donaldson's letter of May 11, 1960 (exhibit D.3 attached) and his further representations made at this meeting. The Committee was of the opinion that there were no grounds upon which it ought to vary the proposal of the Traffic, Fire, Lighting and Police Liaison Committee, and decided to recommend to Council that the proposal of the Traffic, Fire, Lighting and Police Liaison Committee be upheld and that the applicant be accordingly dismissed.
- "29. That this recommendation was submitted to a meeting of the Council on June 1, 1960, and after consideration the recommendation was accepted. Fifteen councillors voted in favour of the recommendation, one against and there was one abstention."

On June 2, 1960, the town clerk wrote to the appellant a letter, an extract from which is as follows:

“Mr. H. C. D’Souza,

Tanga.

Dear Sir,

I am directed to inform you that the Committee hearing your appeal against the proposal of the Traffic, Fire, Lighting and Police Liaison Committee did, after consideration of representations made on your behalf, recommend to Council that the proposal of the Traffic, Fire, Lighting and Police Liaison Committee be upheld; that you be dismissed from the Council’s service with effect from May 31, 1960, and that the whole of the amount standing to your credit in the Local Authorities Provident Fund by way of bonus (including interest thereon) be deducted from the amount of Provident Fund moneys due to you, and be paid to the Council.

The recommendation was accepted and adopted by the Council at its meeting on June 1, 1960, and you are hereby informed accordingly.”

On June 9, 1960, the appellant commenced the present proceedings.

At the hearing before the learned judge the applicant objected to the proceedings which had led to his dismissal by the Council on the grounds *inter alia* of irregularities in procedure and a denial of natural justice in that (1) it was the duty of the Appeals Committee to make due enquiry; (2) that the original complaints were the chairman of the Traffic and Fire Committee and Councillor Patel, and that the chairman had subsequently acted as chairman of the Committee which considered the report against the appellant; and (3) that the same two individuals were present at the hearing by the Appeals Committee, though they were not members of the Committee, and that the Appeals Committee discussed the matter in the absence of the appellant but in the presence of the two complainants before the appellant was called in. Mr. Donaldson applied to file an additional affidavit to prove this last averment, but it was conceded by Mr. Fraser Murray for the Council. Mr. Donaldson objected to the presence of these councillors on the analogy of a clerk to the justices being present with the justices when they retire to consider their decision. Mr. Donaldson submitted further (4) that the charge against the appellant was not framed with sufficient particularity to enable him to know the case he had to meet and that when he (Mr. Donaldson) said that he did not know what case he had to meet, he had been told that his client knew and that it was for him to disprove the allegations.

The learned judge held that the Staff Regulations did not provide for any judicial or quasi-judicial proceeding at first instance, that what the Appeals Committee had to hear was an appeal, that it was not incumbent on them to take evidence, and that they could obtain information in any way they thought best always giving a fair opportunity to the parties to correct or contradict any relevant statement prejudicial to their view: *Board of Education v. Rice and Others* (1), [1911] A.C. 179, 182; *Local Government Board v. Arlidge* (2), [1915] A.C. 120. He held that the members of the Appeals Committee were prepared to listen to any representations which Mr. Donaldson wished to make on behalf of the applicant and that there was nothing to show that they were not prepared to listen fairly; and that whether or not the chairman said that it was for the appellant to disprove the allegations made against him was immaterial, because, the proceedings being in the nature of an appeal, the onus was in fact on the appellant. The learned judge agreed that the town clerk’s letter of April 28, which initiated the proceedings stated the allegations only in general terms and was not sufficiently specific, but he held that the town clerk’s affidavit showed that the appellant was sufficiently informed to enable him to instruct his advocate at the hearing of the appeal. The learned judge held further that there was nothing heinous in the Committee having discussed procedure

before the appellant and his advocate were admitted and, as regards the allegation that the chairman of the Traffic and Fire Committee and another councillor were present though not members of the Appeals Committee, he held that there was nothing to indicate that this influenced that Committee's decision and he could not see that their mere presence was necessarily prejudicial to the appellant.

The first question to be decided is whether certiorari would lie in the present case. I agree with the learned judge that it could be invoked to quash a determination by the Appeals Committee. Speaking of the writs of certiorari and prohibition, Atkin, L.J. (as he then was) said in a well-known passage in *R. v. Electricity Commissioners* (3), [1924] 1 K.B. 171 at p. 205:

"Wherever any body of persons having legal authority to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Banks, L.J., in the same case at p. 195, said that the procedure of certiorari applies:

"in many cases in which the body whose acts are criticized would not ordinarily be called a court, nor would its acts be ordinarily termed 'judicial acts'. The true view of the limitation would seem to be that the term judicial act is used in contrast with purely ministerial acts. To these latter the process of certiorari does not apply . . ."

Under Staff Regulation 10 there are four stages leading to the dismissal of an officer, that is to say (1) the investigation by the head of the department (para. (b)); (2) the proposal by the appropriate committee to relegate or dismiss the officer (para. (c)); (3) the hearing (if desired) before the Appeals Committee (para. (d)); and (4) the decision of the Council (para. (e)). I am of opinion that (1) above is ministerial. I incline to the view that (2) is also ministerial. Clearly (3) is judicial or quasi-judicial and, in my opinion, (4) is quasi-judicial in the sense that it is based upon (3) and is dependent upon the regularity and validity of the proceedings before the Appeals Committee. In my opinion, certiorari would lie to the Appeals Committee and consequently to the Council. No doubt, the answer of the officer would be obtained and considered in the course of the investigation by the head of department under para. (b) but I think that that investigation is ministerial. The only right of appearance by the officer which is conferred by the regulation is before the Appeals Committee under para. (d). There was, in fact, an appearance by the appellant and a fairly full hearing before the Traffic and Fire Committee. I am not convinced that this was necessary though it was a procedure which it was open to the Committee to adopt if they so desired. The written charge is not required to be framed and communicated to the officer until the proceedings before the Traffic and Fire Committee have concluded, and the only right to appear which is prescribed is before the committee entrusted with the hearing of so-called appeals. I think that the scheme of the regulation is that although the proceeding under para. (d) is called an appeal, it is an appeal from an administrative decision and is the first judicial or quasi-judicial hearing.

The general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity are well known. The authorities are reviewed in the recent case of *University of Ceylon v. Fernando* (4), [1960] 1 All E. R. 631. I think that the principles, so far as they affect the present case, may be summarised as under:

- (1) If a statute prescribes, or statutory rules or regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed. As Lord Shaw of Dunfermline said in *Local Government Board v. Arlidge* (2), at p. 138 "If a statute prescribes the means it" (the Local Government Board) "must employ them"; and in *University of Ceylon v. Fernando* (4),

at p. 638 Lord Jenkins, delivering the judgment of the Board and speaking of a clause in the “General Act” of the University of Ceylon, said:

“If the clause contained any special directions in regard to the steps to be taken by the vice-chancellor in the process of satisfying himself, he would, of course, be bound to follow those directions”.

- (2) If no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue: *De Verteuil v. Knaggs* (5), [1918] A. C. 557, 560.
- (3) In such a case the tribunal, which should be properly constituted, must do its best to act justly and to reach just ends by just means (per Lord Shaw in *Arlidge’s* case (2). It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as if it were a trial: it need not examine witnesses; and it can obtain information in any way it thinks best: per Lord Loreburn, L.G., in *Board of Education v. Rice and others* (1), at p. 182; and *Arlidge’s* case (2). A member of the tribunal may, it seems, question witnesses in the absence of the other members of the tribunal and of the defendant and it is not necessarily fatal that the evidence of witnesses (including that of the complainant) may have been taken by the tribunal in the absence of the defendant: *University of Ceylon v. Fernando* (4) at p. 636 and p. 639. In this respect *Fernando’s* case (4) seems to go further than some previous eminent opinion (See e.g. the dictum of Lord Parker, C.J., in *R. v. Agricultural Land Tribunal ex parte Bracey* (6), [1960] 1 W.L.R. 911 at p. 913:

“It (certiorari) goes where there has been a breach of some principle of natural justice . . . like receiving evidence from one party in the absence of another.”

And see per Greer, L.J., in *Errington v. Minister of Health* (7), [1935] 1 K.B. 249 at p. 268:

“he must do it in accordance with the rules of natural justice that is to say he must hear both sides and not hear one side in the absence of the other”.

And see the remarks of Cohen, L.J. (as he then was) in *Johnson & Co. v. Minister of Health* (8), [1947] 2 All E.R. 395 at p. 405).

- (4) The person accused must know the nature of the accusation made: *Byrne v. Kinematograph Renters Society Ltd.* (9), [1958] 2 All E.R. 579, 599 approved in *University of Ceylon v. Fernando* (4).
- (5) A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view: *Board of Education v. Rice and Others* (1); and to make any relevant statement they may desire to bring forward *De Verteuil v. Knaggs* (5); *General Medical Council v. Spackman* (10), [1943] A.C. 627, 641.
- (6) The tribunal should see that matter which has come into existence for the purpose of the quasi-lis is made available to both sides and, once the quasi-lis has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it: *Johnson & Co. v. Minister of Health* (8), at p. 404, p. 405.

As I have said, I am not convinced that these principles apply to the investigation before the Traffic and Fire Committee, which, I think, was purely ministerial. If these principles do apply to that investigation, then I think that it was objectionable that the councillor who was one of the original complainants should have sat as chairman of the Traffic and Fire Committee investigating the alleged offence. Being a complainant, he should

have withdrawn from the Committee on this occasion or should, at the least, have asked the appellant if he objected to his adjudicating on the complaint. Subject to that, I think it is not shown that the principles set out in para. (3) to para. (6) above were not sufficiently complied with by the Traffic and Fire Committee. In particular, it is not shown in any of the affidavits that the appellant was not sufficiently informed of the case against him at that stage and given an opportunity to controvert it and to make any statement he wished.

Turning now to the hearing before the Appeals Committee, which clearly was a judicial or quasi-judicial proceeding, I think, that while there was no objection whatever to the Appeals Committee discussing the matter beforehand in private and settling the procedure, it was objectionable, though not of itself fatal, that the complainants should be closeted with the Appeals Committee for fifteen minutes before the appellant was admitted. It seems to me that the following remarks of Maugham, L.J. (as he then was) in *Errington v. Minister of Health* (7), at p. 279, p. 280 are in point:

“On the other hand, it seems to me a matter of the highest possible importance that where a quasi-judicial function is being exercised, under such circumstances as it had to be exercised here, with the result of depriving people of their property, especially if it is done without compensation, the persons concerned should be satisfied that nothing unfair has been done in the matter, and that *ex parte* statements have not been heard before the decision has been given without any chance for the persons concerned to refute those statements.”

It must have appeared to the appellant that the man who had instituted the complaint against him had first considered it on the Traffic and Fire Committee and was now, with his co-complainant, closeted with the Appeals Committee while he, the appellant, was not permitted to go in. With respect, I disagree with the learned judge when he dismisses this objection merely by saying that there was nothing to show that the presence of the two complainants influenced the Committee’s decision and that he could not say that their mere presence was necessarily prejudicial to the appellant. I would respectfully adopt the words of Lord Wright in *General Medical Council v. Spackman* (10), at p. 644:

“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision.”

If the presence of the complainants with the Appeals Committee in the absence of the appellant did constitute a departure from the principles of natural justice, it is immaterial that their presence may not have influenced the decision.

Moreover, I think that the Appeals Committee did not comply with the principle set out in para. (6) above. Presumably they had a report of some kind from the Traffic and Fire Committee which had investigated the matter. They should have made this, or the substance of it, known to the appellant. It is difficult to conceive why they did not do so, or why any tribunal which intended fairly to listen to both sides would not give some information to an appellant whose advocate said he was embarrassed by not knowing the precise case which he had to meet. That this plea could be made was due to the fact that the requirements of reg. 10 (c) had not been adequately complied with and that the town clerk’s letter of April 28, was not sufficiently specific. I agree with the learned judge that it was not. It might have been justifiable to take refuge in the fact that the Appeals Committee was an appellate body and to say that the onus was on the appellant to disprove the finding against him, if the appellant knew what the finding against him was. But his advocate said that he (the advocate) did not, and there was nothing to show that the appellant did except

in the most general way. It is no answer to say that the appellant knew what the evidence against him had been before the Traffic and Fire Committee. He did; but he did not know of which charges he had been found guilty and what were that Committee's grounds for their proposal to dismiss him. Regulation 10 (c) is express that the grounds upon which the proposed action to dismiss the officer is based must be stated, and, clearly, they must be stated with sufficient precision to enable the officer to exercise the right to appeal conferred under the next following paragraph. The town clerk's letter of April 28, was defective. The defect could have been cured by the Appeals Committee, but they refused to cure it. In the result, the appellant did not know, as he was entitled to know, with sufficient particularity, the grounds upon which the Traffic and Fire Committee had formulated the proposal to dismiss him. Regulation 10 was not complied with and, in my opinion, the principle of natural justice that a fair opportunity must be given to contradict any statement prejudicial to the view of the defendant was contravened also, since the appellant did not sufficiently know what was the case against him at that stage.

The Traffic and Fire Committee and the Appeals Committee may, or may not, have arrived at correct conclusions. That is not a matter with which this court is concerned. What does concern this court is that their procedure was not in accordance with that which the Staff Regulations required and, in my opinion, the principles of natural justice were not observed by the Appeals Committee. Certiorari is, of course, discretionary; but, in my view, the decisions of the Appeals Committee and the Council should not be allowed to stand: they should, in the words of Lord Wright, be declared to be no decisions.

I would allow the appeal and set aside the order of July 26, 1960, and direct that a writ of certiorari be granted to bring up and quash the decisions of the Appeals Committee and the decision of the Council dismissing the appellant consequent thereon. I would also direct that a mandamus be granted addressed to the chairman and members of the Tanga Town Council to cause to be heard and determined the complaint against the appellant in accordance with the provisions of the Staff Regulations and the principles of natural justice. The writs should lie in the Registry of the High Court and should not issue if a new investigation in accordance with reg. 10 of the Staff Regulations is commenced within four weeks from the date hereof and is carried through with reasonable diligence. There should be liberty to apply. The appellant should have his costs here and below, to be taxed.

Sir Alastair Forbes V-P: I agree and have nothing to add.

Gould JA: I also agree.

Appeal allowed. Certiorari granted to bring up and quash the decision of the Finance Committee and the decision of the Council dismissing the appellant. Mandamus granted addressed to chairman and members of Tanga Town Council directing them to hear and determine the complaint against the appellant in accordance with the provisions of the Staff Regulations and principles of natural justice.

For the appellant:

RN Donaldson

For the respondent:

WD Fraser Murray

For the appellant:

Advocates: *Donaldson & Wood*, Tanga

For the respondent:

Fraser Murray, Thornton & Co, Dar-es-Salaam

James Ngaya bin S Mushi v Gerald James Beers
[1961] 1 EA 390 (CAD)

Division: Court of Appeal at Dar-Es-Salaam
Date of judgment: 6 April 1961
Case Number: 1/1961
Before: Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA
Appeal from: H.M. High Court of Tanganyika–Mosdell, J

[1] Negligence – Contributory negligence – Concurrent tortfeasors – Apportionment of liability – Collision of motor vehicles – Negligence of both parties – Respondent driving with elbow out of driving window – Arm amputated – Eastern African Court of Appeal Rules, 1954, r. 65 – Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, 1955, s. 11 (3) (T.) – Law Reform (Contributory Negligence) Act, 1945, s. 1 (3) Law – Reform (Married Women and Tortfeasors) Act, 1935, s. 6.

Editor's Summary

The respondent sued the appellant for damages in respect of personal injuries sustained in a motor accident on the Dar-es-Salaam-Morogoro Road at 11 p.m. on March 22, 1959. The respondent was driving his car towards Morogoro and was being followed by a car driven by a friend. An employee of the appellant, in the course of his employment, was driving a lorry in the opposite direction carrying a load of logs. The offside of the respondent's car and the offside of the lorry collided and the respondent's elbow which was out of the window was so badly injured that the arm had to be amputated. Most of the damages awarded was for this injury. Immediately after the impact the lorry collided with the car behind. The lorry overturned and the respondent's friend was killed in his car which was completely wrecked. His personal representatives were not made parties to the action. The trial judge found that all three drivers had been negligent, and apportioned the negligence as to 15 per cent. to the respondent, as to 50 per cent. to the driver of the lorry, and as to 35 per cent. to the deceased and since the latter was not a party to the action judgment was given against the appellant for an amount equivalent to 85 per cent. of the damage. The award in favour of the appellant was for £6,000 in respect of compensation for loss of earning capacity by reason of the loss of his right arm and £1,485 for the provision and maintenance of an artificial arm over the span of his life. On appeal it was contended for the appellant that the apportionment of 15 per cent. as the respondent's share of the total negligence was too low, that the respondent was the author of his own wrong in that he had his elbow on the driver's window and the loss of his arm, to which the greater part of the damages was attributable, was entirely his own negligence. Counsel also objected to the award of £1,485 and submitted that the £6,000 award was compensation to a one-armed man and that he was getting the cost of the artificial arm twice over. By an amendment of the memorandum of appeal at the hearing, it was further submitted that the trial judge should have held the

appellant liable either for 50 per cent. of the damages (the percentage of blame ascribed to him) or alternatively for 50/65ths of the total. The respondent's counsel did not seriously contest the finding that he was travelling too fast but argued that the excessive speed was small in degree and that it contributed little to the accident, in which the position of the vehicles was the paramount factor.

Held –

- (i) failure to secure the logs in the lorry was not shown to be a contributing cause to the accident and accordingly the percentage of blame assessed by the trial judge upon the appellant's driver should be reduced by 5 per cent.

- (ii) the respondent was, in the circumstances, negligent in driving with his elbow out of the driving window but only to a very small degree, and consequently, 5 per cent. should be added to the trial judge's assessment of his blame.
- (iii) what the trial judge had principally in mind in his award of £6,000 was loss of earning power; he did not mention pain and suffering or loss of the general amenities of life and obviously considered that the respondent was entitled to both sums and the appellate court was not prepared to differ from this view.
- (iv) the award of £1,485 was excessive and ought to be reduced to £900.
- (v) the intention of s. 11 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, 1955, was not to introduce a system of apportionment in judgments between concurrent tortfeasors; therefore, the court could not accept the submission of the apportionment of damages advanced by counsel for the appellant.

Appeal allowed in part. Damages payable by the appellant reduced to £5,620. Respondent to pay one-fifth of the appellant's costs of the appeal.

Cases referred to:

- (1) *Quinn v. Horsfall and Bickham Ltd.*, [1956] 2 All E.R. 467.
- (2) *Davies v. Swan Motor Co. (Swansea) Ltd. (James, Third Party)*, [1949] 1 All E.R. 620; [1949] 2 K.B. 291.
- (3) *Jones v. Livox Quarries Ltd.*, [1952] 2 Q.B. 608.
- (4) *In re Polemis and Another and Furness Withy & Co. Ltd.*, [1921] 3 K.B. 560.
- (5) *Overseas Tankship (U.K.) Ltd v. Morts Dock and Engineering Co. Ltd.*, [1961] 2 W.L.R. 126.
- (6) *Shearman v. Folland*, [1950] 2 K.B. 43; [1950] 1 All E.R. 976.
- (7) *Flack v. Withers (1960)*, The Times, March 22; 1960 Current Law (March) No. 385 (a).

April 6. The following judgments were read by direction of the court:

Judgment

Gould JA: reviewed the evidence and continued: I can now proceed to summarise my views. I respectfully agree with the learned judge that the appellant's driver was negligent in being partly on his wrong side of the road, in driving too fast and in failing to slow when dazzled. I do not agree that the failure to secure the logs was shown to be a contributing cause to the accident. As to the respondent, his counsel did not seriously contest the finding that he was travelling too fast but argued that the excessive speed was small in degree and that it contributed little to the accident, in which position was the paramount factor. On the evidence the speed was not shown to be greatly in excess of what was considered safe, but I think that it must be looked at in conjunction with the fact that the respondent passed very close to the front of the lorry, when there was room for him to go further left. He might, if he had been going more slowly, have had better visibility and more time to act, and the lorry would have had more time to reach its correct side of the road. I think that the speed was material. The other factor,

the position of the respondent's arm on the window, counsel sought also to minimise in the circumstances. I am inclined to agree that this was a minor matter as far as control was concerned, for the respondent did not attempt to make any quick steering movement, and, in fact, retained complete control of the Zephyr after the collision; nevertheless it cannot be altogether eliminated.

One of the grounds of appeal is that the apportionment of 15 per cent. as the respondent's share of the total negligence was too low. So far as the matters

already discussed are concerned I have differed from the learned judge's view only in that I would not include among the contributory causes the failure to secure the load of logs. It is not possible to say what weight the learned judge gave to this factor; probably not very much. The attention of the court was drawn to the case of *Quinn v. Horsfall and Bickham Ltd.*, (1) [1956] 2 All E.R. 467, in which the Court of Appeal, which would not have itself made the same apportionment as the court below, nevertheless held that there were not sufficient grounds for holding the assessment to be wrong. I doubt whether that case applies where an element to which some part of the assessed percentage (however small) must have been attached, has been wrongly taken into consideration.

Before considering this matter further I must deal with a submission of counsel for the appellant, that the plaintiff was the author of his own wrong, in that he had his elbow on the driver's window, and the loss of his arm, to which the greater part of the damages was attributable, was due to his having taken up this position. This damage was due, in counsel's submission, entirely to the negligence of the respondent, and was to that extent severable from the other damage, and that ought to have been taken into account as a major factor in assessing the respondent's share of total responsibility. So far as the facts are concerned, on this aspect of the case, it is only necessary to say that the learned judge found, as a deduction from the facts that the respondent's elbow was smashed but the glass of the window was not, that the elbow must have protruded outside the body of the car. At the same time, as the learned judge took a favourable view of the reliability of the respondent as a witness and did not reject his evidence that he had both hands on the steering wheel the projection, in the nature of things, cannot have been more than one or two inches.

The court was referred to a number of cases, of which *Davies v. Swan Motor Co. (Swansea) Ltd. (James, Third Party)* (2), [1949] 2 K.B. 291, and *Jones v. Livox Quarries Ltd.* (3), [1952] 2 Q.B. 608, are the only ones which bear some slight factual resemblance to the present case. In the former the plaintiff was riding on the step on the side of a dust lorry, and in the latter, on the towbar on the back of a traxcavator, in both cases in exposed positions and contrary to their employers' orders. In each case it was found that a lack of reasonable care for his own safety was one of the causes of the plaintiff's injury and the damages to which he was entitled were reduced accordingly. In *Jones v. Livox Quarries Ltd.* (3), Denning, L.J., concluded his judgment at p. 617, with these words:

"It all comes to this: If a man carelessly rides on a vehicle in a dangerous position, and subsequently there is a collision in which his injuries are made worse by reason of his position than they otherwise would have been, then his damage is partly the result of his own fault, and the damages recoverable by him fall to be reduced accordingly."

Denning, L.J., had earlier in his judgment referred to *In re Polemis and Another and Furness Withy & Co. Ltd.* (4), [1921] 3 K.B. 560 and had said that the consequences of negligence do not depend upon foreseeability but on causation, of which foreseeability was a relevant factor. In the light of the recent decision of the Privy Council in *Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd.* (5), [1961] 2 W.L.R. 126 it would appear that foreseeability ought to be regarded as the decisive test rather than as a relevant factor. I do not think that in the present case anything turns upon fine distinctions but would endeavour to follow what is expressed in the following short passage from the judgment of Singleton, L.J., in *Jones v. Livox Quarries Ltd.* (3), at p. 613:

"Bucknill, L.J., there puts to himself what he describes as the ordinary plain common sense of this business. I believe that to be the test in all these cases."

Did the respondent carelessly put himself in a dangerous position when he allowed his elbow to protrude slightly through the driver's window? Although knowledge of the possibility of accident must be imputed to all drivers of motor vehicles, I doubt whether in normal circumstances a driver could be called careless of his own safety in assuming such a position, to an extent in excess of such blameworthiness as might be imputed to him by reason of his diminished control of the vehicle. In the two cases referred to above the whole person of the respective plaintiffs appears to have been in an exposed position and yet only a comparatively small proportion of the fault was attributed to them. I think that if blame is to attach to the respondent on this account it must be because of the particular circumstances, in which he was passing at speed and on a narrow road, very close to another vehicle by night. I think that a prudent driver would be mindful, in those conditions, that if there were an accident it would most likely affect the driver's side of the vehicle and would correct his driving position. On the other hand he would be entitled to consider that the chances of an accident of such a nature that damage would be substantially aggravated by the difference of a few inches in his position, were remote. I think that the appellant is entitled to succeed on this point but only in a very small degree indeed.

In the result, I am of opinion that the percentage of blame assessed by the learned judge upon the appellant's driver (50 per cent.) should be reduced by 5 per cent. by reason of the view I have already expressed concerning the fastening of the logs; that 5 per cent. should be added to the learned judge's assessment relating to the respondent as an additional element arising from his contribution to his own wrong by the position of his elbow. The court was not invited to disturb the assessment of 35 per cent. upon Yates but I would observe that so far as the findings that he was negligent in driving too fast and being too near the centre of the road are concerned, these could only be factors contributing to the collision between the lorry and the Zephyr in so far as they augmented the degree of difficulty in which the lorry driver was placed by the dazzling headlights of the Vanguard. In that respect the Vanguard's speed and position were undoubtedly relevant.

I come now to the appeal against the actual quantum of damages awarded, as distinct from the allocation of percentages. The learned judge's finding is contained in the following passage of his judgment:

"In the circumstances I am of the opinion that the sum of £6,000 would be a fair and reasonable compensation to the plaintiff for loss of earning capacity by reason of the loss of his right arm, with £200 (less £75 for salvage), added to the latter sum for the loss of the Zephyr motor car plus expenses likely to be incurred in connection with the provision of an artificial arm, amounting to £1,485, over the span of the plaintiff's life."

In view of this award it seems strange to find that there is no claim for the loss of the motor car in the plaint—nor any claim except for general damages for personal injury. No point on pleading was, however, taken by counsel and I can only conclude that the widely framed issue "the amount of damages", recorded by the court as an agreed issue, was intended by counsel to be all-embracing. It would appear that the estimated and prospective cost of an artificial limb is properly to be considered as part of the general damages, as, in the judgment of Asquith, L.J., in *Shearman v. Folland*, (6) [1950] 2 K.B. 43, 51, it is said:

"... all damage which up to the time of the hearing has not yet crystallised in actual disbursement is still prospective in general damages. The judge has awarded £4,500 as general damages. Somewhere embedded in this figure is the prospective damage represented by the need for an

attendant along with other elements such as damages for pain and suffering, and for loss of amenities.”

Counsel for the appellant took the attitude that he could not submit that £6,000 for the loss of the arm was excessive; I do not therefore deem it necessary to detail the personal circumstances of the respondent, which are set out in the judgment under appeal. Counsel did object, however, to the addition of £1,485 for an artificial arm over the span of the plaintiff's life—which, in counsel's submission brought the total to an excessive figure. He submitted that the £6,000 award was compensation to a one-armed man and that he was getting the cost of the artificial arm twice over, on the basis that the provision of that aid would lessen the total inconvenience. It would appear from the judgment that what the learned judge had principally in mind when he awarded the £6,000 was loss of earning power. He did not mention pain and suffering or loss of the general amenities of life. He obviously considered that the respondent was entitled to both sums and I am not prepared to differ. There is a subsidiary question concerning the award of £1,485 for the provision of the arm. This was based on a letter from an “Invalid Equipment” organisation, which was put in evidence by consent. It contains the following items:

“Artificial arm with elbow joint, forearm and detachable hand—	
having rigid fingers and mechanical thumb with table fork, hook and	£110
motoring appliances. Also spare hand, two gloves and six arm mitts about	
Second arm after one year	£110
Third arm after twenty to thirty years	£110
Annual repairs £12 per year for fifty years	£600
Stump socks, five years @ 15/- for 50 years	£187
Relining sockets of arms one each	£60
Damage to clothing, shirts and jackets @ £6 per year	£300
Elastic stump socks and harness to shrunk stump which you Should wear for at	
least two month before being measured for the arm	£8
	<hr/>
	£1,485'
	<hr/>

Leaving aside the estimate of fifty years as expectancy of life (which may be supportable actuarially in the case of a man aged twenty-four years but does not take the uncertainties of life into account) the amount stated in the letter is for other reasons obviously excessive. The items for annual repair (£12 per annum) stump socks (£3 15s. Od. per annum) damage to clothing (£6 per annum) require an outlay of £21 15s. Od. per annum. Invested at 6 per cent. per annum the sum of £350 would bring in £21 per annum and still leave the capital sum intact. Yet £1,087 has been allowed for these items. No reduction in the sum of £110 has been made, in respect of the third arm; that sum invested over a period of twenty-five years would show a handsome return even if present inflationary tendencies continue. Some allowance would have to be made of course for the element of taxation on investment but in my view the award of £1,485 is excessive and I would reduce it to £900.

There remains for consideration a question which was raised for the first time by an amendment to the memorandum of appeal at the commencement of the hearing. The additional ground of appeal claimed that the learned judge should have held the appellant liable, either for 50 per cent. of the damages (the percentage of blame ascribed to him) or alternatively for 50/65 ths of the total. It was not contested by counsel that at common law (apart from the question of contributory negligence) the appellant would have to suffer judgment for the whole of the damage, although Yates' personal representatives were not

parties to the action. In the judgment as it stands he has been held liable for all the damage except the proportion attributable to the respondent's own negligence. The argument placed before this court is based on the opinions expressed by Professor Glanville L. Williams in his book *Joint Torts and Contributory Negligence* (1951) paras. 102–110 as to the mode of apportionment of the loss among concurrent tortfeasors. The opening portion of para. 102 indicates what the learned author has in mind:

“The next problem is the type of judgment that ought to be given in a case involving a trio of negligent parties, at least one of whom is a plaintiff in the action. Each pair of parties are joint or several concurrent tortfeasors as against the remaining party, and at common law joint tortfeasors are liable to suffer joint judgments while several concurrent tortfeasors are liable to suffer joint judgments while several concurrent tortfeasors are liable to suffer several judgments in solidum, i.e., for the whole of the plaintiff's recoverable damages. Since both kinds of concurrent tortfeasors are severally liable at common law to pay the whole of the plaintiff's recoverable damages, it would be easy to reach the hasty conclusion that the outcome must be similar under the Act. But a few minutes' thought will show that this would be an unduly complicated way of disposing of the matter. Joint judgments (which expression will for convenience here be taken as including several judgments against several concurrent tortfeasors for the whole of the plaintiff's recoverable damages) were invented for the benefit of innocent plaintiffs suing joint tortfeasors, and are not suitable where the plaintiff is himself a tortfeasor and is himself exposed to actions by his fellow tortfeasors.”

Many of the possible complications are then dealt with and the following paragraph deals with the:

“Desirability of giving apportioned judgments and of dividing them into primary and secondary judgments”;

I would say, with respect, that the procedure there suggested, as expounded by the learned author, also appears to lead to a great deal of complication. The ground of appeal under consideration is based mainly upon para. 110 which is headed “One concurrent tortfeasor not sued though his existence is known”, which is the present case. In that paragraph two “possible rules” are suggested—(a) that the loss should be divided between the plaintiff and all the tortfeasors or (b) that the loss should be divided only between the parties to the action.

It would perhaps be useful to quote an adumbration of this part of the text book which appears in the “Outline of the Work” at p. xlvii:

“Where a plaintiff guilty of contributory negligence sues concurrent tortfeasors, the latter should not be regarded as liable in solidum (as they would be if the plaintiff were not guilty of contributory negligence), but each defendant should be made liable for an apportioned part of the plaintiff's damages, and should in addition be placed under a secondary judgment liability covering the risk of insolvency of a co-tortfeasor (paras. 102–3, 107). Although this is the desirable principle, it is doubtful how far it can be adopted by the courts under the various apportionment Acts (para. 104).”

Paragraph 104, which refers to the investigation to that point as “undertaken in the spirit of the laboratory” deals with the power of the courts to give apportioned judgments, as distinct from judgments in solidum in such cases. Only one passage from this paragraph (at pp. 407–8) need be set out:

“Another awkward stile that has to be crossed is s. 1 (3), which purports to make the contribution provisions of the Tortfeasors Act apply

where there are concurrent tortfeasors and the plaintiff is guilty of contributory negligence. If such tortfeasors are made liable severally and cumulatively, there may be no place for contribution between them. The insertion of this sub-section in the Contributory Negligence Act shows that the proper principles governing multilateral wrongdoing were not fully thought out by the legislature. At the same time, it is submitted that the sub-section is not conclusive of the matter. It does not cut down the power of the court to do what is just and equitable, and if the court takes the view that justice demands that the liability of concurrent wrongdoers towards a negligent plaintiff should not be solidary, the effect merely is that s. 1 (3) becomes in most cases irrelevant. Even so, the sub-section has a certain sphere of usefulness, for it may properly be invoked where the plaintiff has sued one only of concurrent tortfeasors, who then claims contribution from the tortfeasor not sued (paras. 109–12).”

The section there referred to is s. 1 (3) of the Law Reform (Contributory Negligence) Act, 1945, which has its counterpart in Tanganyika in s. 11 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, 1955. The Tortfeasors Act referred to by the learned author [Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6] is represented in Tanganyika by Part IV of the 1955 Ordinance above mentioned. I think, with respect, that this stile is too awkward for me. By invoking the contribution provisions in cases of contributory negligence I think the legislature has made it manifest that it did not contemplate apportioned judgments, particularly with the possible corollary of primary and secondary judgments. With regard to the power of the court “to do what is just and equitable” it is to be noted that neither the Law Reform (Contributory Negligence) Act, 1945, nor the Law Reform (Married Women and Tortfeasors) Act, 1935, gives the courts power to resort to any mode of judgment they may think just and equitable. The former provides that in cases of contributory negligence the damages recoverable shall be reduced “to such an extent as the court thinks just and equitable”; the latter provides that contribution recoverable shall be “such as may be found by the court to be just and equitable”. The text book quotes the case of *Davies v. Swan Motor Co. (Swansea) Ltd.* (2) as, one in which the procedure contended for was not adopted but the existence of the question was not perceived. There is also the case of *Flack v. Withers* (7) (1960), *The Times*, March 22; 1960 *Current Law* (March) No. 385 (a) in which a plaintiff, himself 23 per cent. to blame, recovered damages against two motorists. There is no suggestion that the judgment was apportioned between them (though the blame was) but the reports available do not deal with the point. In my judgment, in the absence of authority, the intention of this legislation was not to introduce a system of apportionment in judgments between concurrent tortfeasors; the legislation does effect departures from the common law but where it does so it uses unmistakable terms. Had the particular departure now contended for been the intention, I think that it would have been clearly expressed. Counsel for the appellant sought to strengthen his argument by reference to the fact that in Tanganyika, in which the Indian Code of Civil Procedure is in force, there is no third party procedure. I think that the ingenuity of counsel could surmount that difficulty and, if not, it is a matter to be remedied by the rule making or legislative authority; it does not affect the question of the interpretation of the Law Reform legislation which has been under discussion. In my opinion this submission fails.

In the final result I would reduce the award of damages in respect of the artificial arm to £900 and would order that the appellant pay 80 per cent. in lieu of 85 per cent. of the total. The amended total being £7,025 (£6,000 plus £125 plus £900) the liability of the appellant in eight-tenths of that sum, or

£5,620. I would allow the appeal to the extent indicated and order that the decree be amended by the substitution of the sum of Shs. 112,400/- for Shs. 129,370/-. The order for costs in the High Court should not be disturbed. As to the costs of the appeal, the appellant has had only a small measure of success and I would order that the respondent pay one-fifth of the appellant's taxed costs; I consider it a proper case to certify for two counsel.

Sir Kenneth O'Connor P: I agree. The appeal is allowed to the extent indicated by the learned Justice of Appeal and there will be orders in the terms proposed by him.

Sir Alastair Forbes V-P: I also agree.

Appeal allowed in part. Damages payable by the appellant reduced to £5,620. Respondent to pay one-fifth of the appellant's cost of the appeal.

For the appellant:

WD Fraser Murray and RS Thornton

For the respondent:

CW Salter QC and CB Kotecha

For the appellant:

Advocates: *Fraser Murray, Thornton & Co*, Dar-es-Salaam

For the respondent:

O'Beirne & O'Connor, Nairobi

SN Shah v CM Patel and others
[1961] 1 EA 397 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 June 1961
Case Number:	12/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA
Appeal from:	H.M. Supreme Court of Kenya—Pelly Murphy, J

[1] *Practice – Point of law not pleaded – Point raised for first time in counsel's closing speech – Whether such point of law can be entertained – Civil Procedure (Revised) Rules, 1948, O. VI, r. 5 and O. XIV, r. 1 (6) and r. 2 (K).*

[2] *Money-lender – Land charged to secure repayment of sums lent – Loans made against promissory notes – Claim that loans were money-lending transactions – Whether transactions exempted from the Money-lenders' Ordinance – Money-lenders' Ordinance (Cap. 307), s. 3, s. 7 and s. 11 (K.) –*

Registration of Titles Ordinance (Cap. 160), First Schedule (K.) – Interpretation and General Provisions Ordinance, 1956, s. 36 (K.) – Indian Transfer of Property Act, 1882, s. 67.

Editor's Summary

The appellant, a merchant, owned land at Nairobi which he charged to the second respondent to secure a loan of Shs. 80,000/-. By a second charge dated April 30, 1955, the appellant charged the land to the first respondents to secure a sum not exceeding Shs. 75,000/- and interest pursuant to which the appellant was advanced Shs. 40,000/- and Shs. 20,000/- against two promissory notes dated May 7 and May 17, 1958, respectively. The first respondents subsequently sued the appellant claiming these amounts with interest, for an account of what was due to them under the second charge, payment into court of the amount found due and in default an order for sale of the property and consequential relief. In his defence the appellant averred that the second charge was invalid and unenforceable because it did not conform to the statutory forms of charge set out in the Registration of Titles Ordinance and because it

was not validly attested, that it was a sham and colourable document not given for valid consideration and procured by undue influence, that it was procured with the object of defeating the provisions of the Money-lenders' Ordinance and of securing repayment of loans which were then irrecoverable. It was alleged that both sums were irrecoverable as the respondents had been carrying on business illegally and the contracts did not comply with s. 11 of the Money-lenders' Ordinance and that accordingly the second charge was unenforceable. The first respondents replied and denied the allegations that the charge was for the reasons pleaded invalid or unenforceable and said that the Money-lenders' Ordinance did not apply. The trial judge held that the first respondents had lent the moneys claimed, that the transactions were made bona fide, that by virtue of s. 36 of the Interpretation and General Provisions Ordinance the second charge was valid, that it had been properly attested by an advocate, that it had not been procured by undue influence and had been given for valuable consideration, that the contracts evidencing the loans were not subject to registration under the Registration of Titles Ordinance and that the amounts due under them were not irrecoverable for non-registration. He further held that by virtue of s. 3 of the Money-lenders' Ordinance, the other provisions of that Ordinance were not applicable, and gave judgment for the first respondents. The appellant thereupon appealed and submitted, *inter alia*, that the judge had erred in finding that s. 3 of the Money-lenders' Ordinance made the other provisions of the Ordinance inapplicable. The other substantial point argued on appeal was that the suit was one for sale of mortgaged property under s. 67 of the Indian Transfer of Property Act, 1882, and that under that section such a suit could only be brought by a mortgagee when the mortgage money had become due to him. It was argued for the appellant, that the title to the promissory notes at the commencement of the action was not in the first respondents, that the debt could not be separated from the security and accordingly the respondents were not when they brought action entitled to sue. This defence had not been pleaded and was raised for the first time at the trial when appellant's counsel was making his final submissions.

Held –

- (i) the words “or any bona fide transaction of money-lending upon such mortgage or charge” would include a bona fide loan upon an existing charge which had been created some time prior to the loan, and the court could see no warrant for reading into s. 3 (1) *ibid.* the words suggested by counsel for the appellant.
- (ii) there was no reason for differing from the judge's finding that the transactions were made bona fide; even if the previous loan were unenforceable because of some provision of the Money-lending Ordinance, there was nothing to prevent the borrower agreeing, if he so wished, to renew the contract in consideration of a promise of further advances and to secure it by a charge on land which would oust the provisions of that Ordinance; the presence in the Ordinance of s. 3 (1) (b) would distinguish such a case from *Dunn Trust v. Feetham* [1936], 1 K.B. 22.
- (iii) where additional security by way of a charge on land is demanded as a condition of renewal of a loan and is given, it would be impossible to say that the money-lending transaction constituted by the new loan was not secured by the charge, whether it was also secured by promissory notes or not and whether or not the notes were described as the primary security.
- (iv) it was for the appellant, as the person primarily liable on the bill or note, to plead that it had been indorsed away by the respondents so that the appellant was liable on it to other parties; if he had raised the matter when he should have raised it, there would have been an opportunity for the plaintiffs to call evidence to show, if this was the fact, that they were in a position, when the suit was commenced, to hand back the respondents' promissory notes on

payment of the amounts found due; it was too late to rely on it in a final address when the evidence had been closed.

Appeal dismissed.

Cases referred to:

- (1) *Lancaster (John) Radiators Ltd. v. General Motor Radiator Co. Ltd.*, [1946] 2 All E.R. 685.
- (2) *Robins v. National Trust Co.*, [1927] A.C. 515.
- (3) *B. S. Lyle Ltd. v. Chappell*, [1932] 1 K.B. 691.
- (4) *Dunn Trust v. Feetham*, [1936] 1 K.B. 22.
- (5) *Chimanbhai Motibhai Patel and Others v. Hasham Jiwa*, Kenya Supreme Court Civil Case No. 303 of 1956 (unreported).
- (6) *Walker v. Jones* (1865), L.R. 1 P.C. 50.
- (7) *Davis v. Reilly*, [1898] 1 Q.B. 1.
- (8) *Nika Singh v. Dewa Singh and Another* (1938), 18, K.L.R. 3.
- (9) *Price v. Price*, 153 E.R. 1174.
- (10) *National Savings Bank v. Tranah* (1867), L.R. 2 C.P. 556.
- (11) *Stirling v. John*, [1923] 1 K.B. 557.
- (12) *Vishvanath Chhaganlal Trivedi v. Korshed Kaiku Wadia*, [1959] E.A. 619 (C.A.).

June 1. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from the Supreme Court of Kenya against a judgment given for the first respondents (plaintiffs in the Supreme Court) against the appellant in two consolidated suits.

The appellant (first defendant in the court below) is a merchant and carries on business in Nairobi under the style of Shah Narshi Karamshi & Sons. He is the registered proprietor of a piece of land in Nairobi. The second respondent is a limited company having its registered office in Nairobi. No relief was claimed against the second respondent in the Supreme Court and it was only joined in these proceedings because it holds a first charge over the land of which the appellant is the registered proprietor.

The first respondents are money-lenders and they trade under the names of “Shinh Bros.” and “Chimanbhai Motibhai Patel”. They are also closely connected with a limited company called Genuine Finance Ltd. which was incorporated in 1955 and carries on the business of money-lending.

The appellant is the registered proprietor of the land described in the plaint. By a duly registered charge (the first charge) he charged this to the second respondent to secure Shs. 80,000/-.

In the first of the two consolidated suits the first respondents claimed that by another duly registered charge dated April 30, 1955 (called “the second charge”) the appellant charged the same land in their favour to secure repayment of sums not exceeding Shs. 75,000/- which the first respondent agreed to lend to the appellant from time to time with interest, costs and expenses as mentioned in the second charge subject to the terms and conditions set out therein, and they averred that they advanced a sum of Shs. 70,000/- to the appellant on the terms and conditions mentioned in the second charge.

The first respondents averred further that it was agreed between them and the appellant under the terms of the second charge:

- “(a) that the appellant would pay to the first respondents each sum advanced to the appellant by the first respondents upon such day as

- should be agreed upon with interest thereon in the mean time from the date of the same having been advanced at such rate and on such days as should be agreed upon at the time of making each advance;
- (b) that the appellant would enter into all necessary agreements and contracts with the first respondents as might be required by the first respondents to secure each sum advanced in pursuance of the agreement contained in the said second charge together with interest thereon at the agreed rate, and the appellant agreed to pay such interest and perform and observe such agreements and conditions as would be contained in the said contracts and agreements;
 - (c) that the total sum advanced in respect of the said advances and secured under the said second charge would not at any one time exceed the sum of Shs. 75,000/- together with such sum or sums for interest as should accrue up to the date of payment of the principal sum.
 - (d) that the first respondents should cease to make any further advances to the appellant at any time after three years from the 30th day of April, one thousand nine hundred and fifty-five by giving to the appellant three calendar months' notice in writing in that behalf."

The second charge was exhibited.

The first respondents further averred that under contracts dated respectively May 7, 1958, and May 17, 1958, they had advanced to the appellant Shs. 40,000/-, and Shs. 20,000/- and that there was now due to them with interest the sums of Shs. 43,000/- and Shs. 21,500/- respectively. They said that by a letter dated May 19, 1958, they had notified to the appellant their intention to cease making further advances under the second charge. The first respondents claimed these amounts from the appellant and prayed for an account of what was due to them under the second charge, payment into court of the amount found due and an order to them to reconvey on such payment and in default of payment an order for sale of the property and consequential relief.

By his defence to the first suit the appellant alleged:

- (1) that the second charge was invalid and unenforceable, as not conforming to the statutory forms of charge set out in the Registration of Titles Ordinance (Cap. 160 of the Laws of Kenya);
- (2) that the second charge was unenforceable because not validly attested;
- (3) that the second charge was a sham and colourable document; was not given for valid consideration; was procured by undue influence; and was procured with the object of defeating the provisions of the Money-lenders' Ordinance (Cap. 307 of the Laws of Kenya) and of securing repayment of loans which were then irrecoverable, having been made by money-lenders whose firm name or names had not been registered in the Registry of Business Names for three years before the commencement of the Money-lenders' Ordinance. (The reference appears to have been to s. 7 (5) (c) of that Ordinance.) It was alleged that about April, 1955, when there was a sum of about Shs. 90,000/- due to the first respondents by the appellant on money-lending transactions, the first respondents, realising that this sum would be irrecoverable because of the provisions of s. 7 (3) (c), had forced the appellant to give them the second charge and that no consideration had passed on its execution. It was further alleged that the first respondents had thereafter forced the appellant to sign from

time to time a series of renewals of the existing contracts. It was said that the sums due were not recoverable at law as (i) both the respondents' firms had been carrying on business illegally; and (ii) the contracts did not comply with s. 11 of the Money-lenders' Ordinance: accordingly the second charge was tainted with illegality and unenforceable. There followed a general denial of all the allegations set out in the plaint.

By their reply in the first suit the first respondents joined issue, denied that the second charge was procured by undue influence or threat of court proceedings or that the payments made thereunder had anything to do with the money-lending transactions between the parties. They pleaded further that, by virtue of s. 3 of the Money-lenders' Ordinance, the allegations that the second charge was tainted with illegality were irrelevant, and they ended with a general traverse of the allegations in the defence.

The pleadings and claim in the second suit were similar except that the respondents' claim was in respect of a sum of Shs. 10,000/- said to have been advanced to the appellant under the second charge by a contract in writing dated August 1, 1958, which, with accrued interest, amounted to Shs. 10,200/-. In addition to defences similar to those pleaded in the first suit, the appellant alleged that the second suit was not maintainable, as the claim should have been included in the first suit. The learned judge, however held (correctly in my view) that the money could not have been claimed in the first suit since, at the time of the institution of that suit, it had not become payable.

It is unnecessary to mention the defences of the second respondent, since nothing turned on those either in the Supreme Court or on the appeal.

At the outset of the proceedings in the Supreme Court a long argument was addressed to that court by the learned counsel for the plaintiffs (first respondents) urging that the various issues raised by the pleadings could and should be disposed of as matters of law under O. XIV, r. 2, of the Civil Procedure (Revised) Rules, 1948. This, since the pleadings clearly raised issues of fact as well as law, was rightly rejected by the learned judge.

Learned counsel for the plaintiffs (first respondents) then submitted that it was for the first defendant (appellant) to begin, on the ground, apparently, that the execution of the second charge had not been denied and that the loans had not been denied. The learned judge ruled that he could not decide the question of who should begin until either the parties had agreed issues or issues had been framed by the court. Counsel for the plaintiffs then suggested issues, but before issues could be framed, the case had to be adjourned. It was later resumed before another judge.

Counsel for the plaintiffs again submitted that the first defendant should begin, alleging that there was no denial that the first defendant executed the second charge and took the loans and that the defences were in the nature of confession and avoidance. He submitted that issues need not then be framed. The learned judge upheld this contention, ruling that the first defendant had not put in issue the fact of the existence of the second charge, nor the fact of its having been registered, nor the facts that the loans had been made and that the money lent had become repayable. The learned judge said that these facts were not denied. He ruled that it was for the first defendant to begin and said that he would not frame issues at that stage, but would frame issues later. The first defendant was then called upon to begin.

In fact, the learned judge did not frame issues until he came to write his judgment.

The learned judge's failure to frame issues (except in his judgment) was the basis of the first two grounds of appeal, paras. 1 and 2 of the memorandum of appeal. It will be convenient to deal with these now. In my opinion, there

would have been considerable advantage in this case in framing issues before the evidence was called; but issue had been joined upon the pleadings and it was not, therefore, obligatory upon the learned judge to frame issues: O. XIV, r. 1 (6), of the Kenya Civil Procedure (Revised) Rules, 1948. The fact that he did not do so would be no justification for upsetting his decision. In my opinion, grounds of appeal Nos. 1 and 2 fail.

The third, fourth and fifth paragraphs of the memorandum of appeal attack the learned judge's decision on the burden of proof and his ruling that the first defendant must begin. As already stated, the learned judge ruled that, on the pleadings, the first defendant had not put in issue the fact of the existence of the second charge, or the fact of its registration, or the fact that the money lent had become repayable, and the learned judge stated that these facts (all of which had been pleaded in the complaints) were not denied. I think, with the greatest respect, that the learned judge fell into error. He seems to have overlooked the general denial contained in para. 7 of the defence of the first defendant in each suit. This denied all the allegations contained in the complaints as if they had been set out and traversed seriatim except where expressly or impliedly admitted. A general denial of this kind is valid and effectual: *Lancaster (John) Radiators Ltd. v. General Motor Radiator Co. Ltd.* (1), [1946] 2 All E.R. 685. There was no express or implied admission of the matters mentioned. It is in para. 6 of the complaints that the making of the second charge is pleaded and the lending of Shs. 70,000/- under it. In para. 2 of his defences the first defendant pleads:

“As to paras. 6 and 7 of the complaint, this defendant will without admitting the accuracy or correctness of the allegations set out therein, maintain that the second charge is invalid, etc.”

Clearly, there is no express or implied admission here (or elsewhere) in the defences of the first defendant which would modify the general denial, contained in para. 7 of each defence, of the making of the second charge and the lending of Shs. 70,000/- under it. Neither did the first defendant admit the plaintiffs' averment that they lent Shs. 70,000/- to him upon the terms and conditions stated in the second charge since he was averring (in para. 4 of the defence) that the loan was already outstanding when the second charge was executed. There was no “confession” in the defences of the primary facts averred in the complaints and the onus was upon the plaintiffs to prove the making of the second charge and the lending of money under it before any question arose on its legality or of repayment of money lent. I think, with respect, that it was for the plaintiffs to begin. But the fact that the learned judge may have been wrong in casting the onus of proof on the first defendant would not be a valid ground for reversing, on appeal, his findings based on the evidence. The case was not decided on onus: it was, in so far as the decisions were decisions of fact, decided on the evidence after fully hearing both sides. As Lord Dunedin said, in delivering the judgment of the board in *Robins v. National Trust Co.* (2), [1927] A.C. 515 at p. 520:

“but onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.”

The learned judge found that the plaintiffs did lend to the first defendant the moneys claimed in the two suits at the rate of interest specified, and that the transactions were made bona fide. He held also that although the second charge did not precisely follow the form prescribed by the First Schedule to

the Registration of Titles Ordinance, it was substantially in that form and valid by virtue of s. 36 of the Interpretation and General Provisions Ordinance. The learned judge was satisfied on the evidence that the second charge had been attested by an advocate as required by law and he did not believe the first defendant on that point. He found that the second charge had not been procured by undue influence and had been given for valuable consideration, namely, the plaintiffs' agreement to advance moneys to the first defendant. The learned judge held that the contracts evidencing the loan were not subject to registration under the Registration of Titles Ordinance and that the amounts due under them were not irrecoverable for non-registration. He held further that, by virtue of s. 3 of the Money-lenders' Ordinance, the other provisions of that Ordinance were not applicable to the transactions the subject matter of the suits. He gave judgment for the plaintiffs with costs.

Mr. Mandavia, counsel for the appellant, strongly attacked the decision of the learned judge that s. 5 of the Money-lenders' Ordinance rendered inapplicable the other provisions of that Ordinance. Section 3 (1) (b) of that Ordinance is as follows:

"3.(1) The provisions of this Ordinance shall not apply:

.....

- (b) to any money-lending transaction where the security for repayment of the loan and/or interest thereon is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of money-lending upon such mortgage or charge."

Mr. Mandavia addressed to us two arguments on these provisions. In the first place, he stressed the words "is effected" and pointed out that the wording was not "has been" or "shall be" effected. If I understood his argument on this point correctly, it was to the effect that s. 3 would not apply unless the execution of the mortgage or charge was contemporaneous with the money-lending transaction. Mr. Mandavia submitted that s. 3 (1) must be read as if the words "at or about the time the loan was made" were inserted after the word "execution" in para. (b): if the sub-section were not read thus, it would have the effect of nullifying the provisions of the Money-lenders' Ordinance, notably of s. 11, and this could not have been the intention of the legislature. Mr. Mandavia pointed out that loans had been made to the appellant by Chimanbhai Motibhai Patel and Shinh Bros. before the date of the second charge and after that date, though he alleged that the transactions which took place after that date were merely renewals of existing indebtedness. Mr. Mandavia argued that a fresh security must be made whenever a loan is renewed and that anything in the nature of a mortgage or charge on land to secure a current account would not fall within s. 3. I am unable to accept this contention. There is nothing equivalent to s. 3 (1) (b) in the English money-lending legislation, so that no guidance can be obtained from English authorities; but it seems to me that the words "or any bona fide transaction of money-lending upon such mortgage or charge" would include a bona fide loan upon an existing charge which had been created some time prior to the date of the loan. I see no warrant for reading into the section the words suggested by Mr. Mandavia, A renewal may be, in effect, a fresh loan. As Scrutton, L.J., said in *B. S. Lyle Ltd. v. Chappell* (3), [1932] 1 K.B. 691 at p. 700:

"In my opinion, when the time for payment of the original loan has expired without complete repayment, and the time for repayment is extended or altered, there is a fresh loan . . ."

If the time for payment is extended in reliance on the security of an existing

charge, there is, in my opinion, a “transaction of money-lending upon such . . . charge”. The learned judge found that the material transactions in this case were made bona fide, and I see no reason to differ from that finding. Even if the previous loan would have been unenforceable because of some provision of the Money-lenders’ Ordinance, I see nothing to prevent the borrower agreeing, if he wished, to renew the contract in consideration of a promise of further advances and to secure it by a charge on land which would oust the provisions of that Ordinance. The presence in the Ordinance of s. 3 (1) (b) would distinguish such a case from *Dunn Trust v. Feetham* (4), [1936] 1 K.B. 22.

Mr. Mandavia next stressed the words “the security” in para. (b) of s. 3 (1). He submitted that this must be read as “the only security” and that the paragraph would only apply if the second charge were the only security for the advances, and he pointed out that in all the transactions promissory notes had been taken as security, and that in the contracts sued on, it was stated that the promissory notes were given as security for the repayment of the loan and the second charge was merely referred to as “other security”. This is quite true; but, since the promissory notes in the contracts sued upon were signed only by the appellant, they were scarcely more than a mode of payment of the debts due and indeed were so described in the contracts. Assuming, however, that they were (as I think they were) security for the loan, so was the second charge. Indeed, the appellant’s evidence was to the effect that C. M. Patel came to him and said that his firm would not renew the loans without security such as land—they had been advised of “some legal hitch, so he wanted security”. It was alleged by Mr. Mandavia that the reason for demanding a charge on land was that C. M. Patel knew that his money-lending transactions were illegal under s. 7 (3) (c) of the Money-lenders’ Ordinance for lack of registration of his firms’ names. But there was no finding to that effect by the learned judge and it was denied by C. M. Patel in evidence. It seems to me that the evidence established that from the time of execution, the second charge was substantially the security for the loans: at least it was a sine qua non of renewal of the loans and a substantial part of the security. It would, I think, be impossible to say that where additional security by way of a charge on land was demanded as a condition of renewal of a loan and was given, that the money-lending transaction constituted by the new loan was not secured by the charge, whether it was also secured by promissory notes or not and whether or not the notes were described as the primary security. In my opinion, Mr. Mandavia’s contentions fail and s. 3 (1) (b) applies. If so, it is superfluous to consider s. 11 and the other sections of the Money-lenders’ Ordinance, as they are not applicable. The Supreme Court of Kenya in a somewhat similar case seems to have come to the same conclusion: *Chimanbhai Motibhai Patel and Others v. Hasham Jiwa* (5), Kenya Supreme Court Civil Case No. 303 of 1956 (unreported). An appeal against that judgment was dismissed by this court in Civil Appeal No. 2 of 1957.

Grounds of appeal 6, 7 and 8 are repetitive and (like the rest of the memorandum of appeal) of a remarkable prolixity. Ground 6 seems to assert that the second charge was void because (a) it was made without consideration, no money having been advanced under it; (b) it was vague and uncertain; (c) it secured or charged nothing and was, at best, merely an agreement to give security and not itself a charge; and (d) it had been materially varied by three loan contracts which amounted to novations. In my opinion, none of these assertions is well-founded. I agree with the learned judge that the consideration for the second charge (apart from any other consideration which might be made out) was the lenders’ agreement to make further advances. I am unable to agree that the second charge was vague and uncertain. It, in effect, charged the land as a continuing security to secure sums owing from time to time by

the borrower to the lender in respect of any transactions which might take place between them. It rather resembled a current account mortgage. I see no reason for holding it to be invalid on that account. The second charge was not varied by the three loan contracts referred to and there was no question of novations. The charge contemplated that there would be subsequent contracts and agreements between the parties and, as already stated, charged the land to secure sums due under them. Each loan contract set out the terms of the loan and its repayment and mentioned the second charge as part of the security. In my opinion, the arguments contained in para. 6 of the memorandum of appeal are untenable.

Paragraph 7 of the memorandum appears to allege that the three contracts of May 7, May 17 and August 1, 1958, were not proved by the plaintiffs to be related to the second charge and that until that was proved, there was no mortgage debt, no liability to the plaintiffs and no right of action; accordingly, the plaint did not disclose a cause of action: the plaintiffs had not proved that the loans were made in pursuance of the agreement to lend money contained in the second charge and the loans were not secured by it. Not only was there evidence that the loans were made or renewed pursuant to the second charge, and the first defendant's own evidence that they would not have been made without it; but the three contract documents referred on the face of them to the second charge as part of the security for the loans. In my opinion, this ground of appeal is frivolous. Mr. Mandavia did not attempt to argue it, but expressly said that he did not abandon it, so that I have had to deal with it, and shall have to deal with other grounds of appeal which he treated similarly.

Paragraph 8 of the memorandum of appeal alleges that the three contracts are independent agreements and stand or fall by themselves and that, therefore, the plaintiffs were not entitled to sue on the second charge. I do not think that there is anything in this. The second charge provided for contracts to be entered into and, when entered into, to be secured by the second charge, and the plaintiffs were entitled, on breach of the contracts, to sue to enforce the security.

Paragraph 9 of the memorandum of appeal comprises nearly three pages of typescript. It first attacks the finding of the learned judge that the second charge was duly registered. I agree with the learned judge's finding on that point. It is then contended that the second charge "amounts to nothing and is too vague and uncertain" because it is expressed to be:

"a continuing security so long as any dealing shall take place between the parties hereto for all principal moneys and interest which shall from time to time be owing by the borrower to the lenders."

It is said that "dealing" might include other transactions besides loans. In my opinion, in the context the meaning is perfectly plain and there is nothing vague or uncertain about it. It is then said that the second charge is inoperative because it does not charge the land with repayment. This contention is a mere quibble. The second charge (as already mentioned) charges the land:

"to the intent that this charge shall be a continuing security . . . for all principal moneys and interest which shall from time to time be owing by the borrower to the lenders."

It is then said that the learned judge was wrong in holding that the respondents did lend the appellant the moneys claimed in the plaint and that the second charge was not a sham or colourable document—and was properly attested. There was evidence to support all these findings and I agree with them. It is said that the judge was wrong in not holding that the alleged loans were unenforceable as being in contravention of the Money-lenders' Ordinance. The other provisions of the Money-lenders' Ordinance did not apply if s. 3 (1) (b) applied, as I have held it did.

Paragraph 10 of the memorandum of appeal attacks the validity of the first charge and the propriety of joining the second defendant as a party. There does not seem to be any merit in this contention and I doubt whether it is open to the appellant at this stage: it could not affect the result of the appeal as between the appellant and the first respondents.

Paragraph 11 of the memorandum of appeal consists of mere general allegations that the judgment is bad in law, erroneous and against the weight of the evidence. These are not, as drafted, valid grounds of appeal.

In my opinion, Mr. Mandavia made a correct appraisal of paras. 6 to 11 inclusive of the memorandum when he did not think any of the contentions set out in them worth arguing on the appeal.

I turn now to the only point of any substance in the case. Mr. Mandavia contended, in effect, that the suit was a suit for sale of mortgaged property under s. 67 of the Indian Transfer of Property Act and that, under that section, such a suit could only be brought by a mortgagee when the mortgage money had become due to him. It was in evidence that the promissory notes which had been given in respect of the debts sued for had been drawn by the appellant in favour of Shinh Bros., indorsed generally by Shinh Bros., then indorsed specially by Genuine Finance Ltd. to the Bank of Baroda Ltd., and specially indorsed back by the bank to Genuine Finance Ltd. Accordingly, Mr. Mandavia argued that the title to the notes was outstanding in Genuine Finance Ltd. at the commencement of the action and that the debt could not be separated from the security: *Walker v. Jones* (6) (1865), L.R. 1 P.C. 50, 62. Accordingly, he said, the plaintiffs were not at the time they brought their suit entitled to sue, and their suit should, therefore, have been dismissed. He relied on *Davis v. Reilly* (7), [1898] 1 Q.B., 1, and *Nika Singh v. Dewa Singh and Another* (8) (1938), 18 K.L.R. 3. No defence of this nature was raised or foreshadowed in the defence of the first defendant (appellant) and no mention of this contention was made when Mr. Mandavia opened his case for the first defendant in the court below. This matter was raised for the first time when Mr. Mandavia was making his final submissions. The learned judge dealt with this as follows:

“Mr. Mandavia, for the first defendant, did not then open the law on which he intended to rely. In making his final submissions he raised two points of law which had not been pleaded or previously canvassed. In my opinion the first defendant is debarred from so doing and I so hold. Even if I am wrong in so holding, I do not think there is any substance in the points so raised. The first was that, because the promissory notes had been endorsed over by the plaintiffs to Genuine Finance Limited, the plaintiffs had no right of action. As authority for this proposition Mr. Mandavia relied on *Nika Singh v. Dewa Singh and Lal Singh* (1938), 18 K.L.R. 3. The second point (which is very much akin to the first) is that the promissory notes were not in the possession of the plaintiffs at the time of the commencement of the suit and therefore the plaintiffs could not succeed in their claim and Mr. Mandavia relied on *Davis v. Reilly*, [1898], 1 Q.B. 1 to support that argument. In my opinion both cases are clearly distinguishable from the present one because in the instant case the promissory notes are not being sued on. Here it is the second charge which is being sued upon and the promissory notes and the cheques merely evidence the fact that advances were made under it.”

With respect, I do not think that the distinction drawn by the learned judge between the present case and the cases of *Nika Singh v. Dewa Singh* (8), and *Davis v. Reilly* (7), is valid. Mr. O'Donovan, for the respondents, could not support it. In *Davis v. Reilly* (7), the action was not on the bills, but against Reilly for the price of the goods supplied. (There had been a previous suit against the drawer of the bill.) In *Nika Singh's* case (8), the suit was not solely

on the promissory note: there were alternative claims on the basis of an account stated and for the price of goods sold and delivered and money lent.

At first sight, it would appear that it was for the plaintiffs to prove as part of their case either that the promissory notes were indorsed to them before action brought or that they then had them in their possession and could deliver them over to the first defendants on payment of the amounts found due. The authorities, however, appear to show that it is for the defendant, if he is the person primarily liable on the bill or note, to plead that it had been indorsed away by the plaintiff so that the defendant is liable on it to other parties. Bullen and Leake Precedents of Pleadings (11th Edn.) at p. 762 says:

“*Pleading*. If the defendant is the person primarily liable on the bill or note given on account of the debt, the defence must show that the bill or note was duly paid before action, or that it was not due at the time of action brought, or that it has been indorsed away by the plaintiff, so that the defendant is liable on it to other parties, or that it has been lost by the plaintiff and remains so lost. (*Price v. Price* (1847) 16 M. & W. 232)”.

and at p. 763 the learned authors give a form in which the defendant pleads that:

“before the bill became due the plaintiff indorsed it away for value to G.H. or some person unknown in whose hands it was still outstanding”.

Price v. Price (9), 153 E.R. 1174 was a suit against the defendant as maker of a promissory note and there were counts for money lent and on an account stated. The plea was that the defendant had made a promissory note for part of the debt which the plaintiff had accepted. Replication: that the note was overdue and unpaid before action brought. Special demurrer: that the replication did not show that the plaintiff was entitled to receive payment or that he held the promissory note at the commencement of the action. Parke, J., having said, *inter alia*, that if a creditor is content to take a bill or note for a debt, he cannot sue for the debt until such bill or note becomes payable and default is made in payment, continued at p. 1178:

“But if the plea state no more than that a negotiable note is given for and on account of the debt, by which the defendant promised to pay the plaintiff, or order, a sum of money, and does not state the note to be still running (which is the case), there seems to us to be no *prima facie* answer. The remedy is not suspended at the time of action brought, so that there is no defence on that ground; and, according to the principles of pleading, it is to be intended that the note remains as it was, and that no order was made by the plaintiff for the payment to a third person, as it is not so averred; and therefore, for anything stated in the plea, the note remains overdue in the hands of the plaintiff; so that the suspension of his right of action for the original debt is at an end, and he may recover the amount, no presentment or notice of dishonour being necessary in his case; and therefore such a plea is no answer to the action. In a declaration on a note payable to order, it never is stated that no order was made, but it is presumed that there is none until the defendant pleads it, though it is true in both cases that the fact, whether an indorsement has been made or not, lies more in the plaintiff’s knowledge than the defendant’s. But in the case of a declaration, the rule, that a party is to plead facts within his own knowledge, gives way to the rule that things are to be presumed to continue in the same state till the contrary appears. To make this plea, therefore, good, it should be averred that the note was not in the plaintiff’s hands, that is, that it was indorsed over before action brought.”

And in *National Savings Bank v. Tranah* (10) (1867), L.R. 2 C.P. 556 at p. 558, Willes, J., said:

“The plea must state that the note is outstanding in the hands of third parties, instead of leaving the contrary to be implied.”

In my opinion, upon these authorities and under O. VI, r. 5, of the Civil Procedure (Revised) Rules, 1948, it was for the appellant to raise this plea in his defence if he intended to rely upon it and it was for him to make it good. If he had raised the matter when he should have raised it, there would have been an opportunity for the plaintiffs to call evidence to show, if this was the fact, that they were in a position, when the suit was commenced, to hand back the plaintiffs’ promissory notes on payment of the amounts found due. The probabilities are that they were. C. M. Patel said that he was not only a partner in the plaintiff firm but also a director of Genuine Finance Ltd.: he and the second plaintiff shared the money-lending work of that company: the promissory notes were mostly being discounted by Genuine Finance Ltd., but the profit might have been credited to any of the three concerns. Although, of course, Genuine Finance Ltd. was a separate entity from the plaintiffs and Shinh Bros, it is obvious that there was a very close connection between them and the probability is that promissory notes required by one of the three concerns would be made available by another. However this may be, it was for the first defendant to plead the point and give an opportunity for evidence to be called upon it. It was too late to rely on it in a final address when the evidence had been closed.

I would dismiss the appeal.

As to costs, I think that the defendants should have had the costs in the court below of the protracted arguments on the plaintiffs’ submissions that various matters should be disposed of as preliminary points of law and that the first defendant should begin. Taking this into consideration, I would vary the order as to costs of the learned judge only to the extent that the plaintiffs should have three-quarters of their costs in the Supreme Court.

As to the costs of the appeal: The respondents should have these, the taxing master bearing in mind that the second respondent did not appear. Included in the record of appeal were ten closely typed pages consisting of copies of a motion to consolidate the two suits and of an affidavit in support with copies of exhibits and a copy of an affidavit in reply. There was no appeal against the order to consolidate the two suits and Mr. Mandavia, when asked to account for the inclusion of these papers in the record of appeal, admitted that they had no relevance to the appeal. The costs of and incidental to the inclusion in the record of appeal of these unnecessary and irrelevant papers should be paid by the appellant’s advocate and should not be charged to his client.

Sir Alastair Forbes V-P: I have had the advantage of reading the judgments of both the learned President and the learned Justice of Appeal in this case. I am in full agreement with both judgments and have nothing to add.

Gould JA: I have had the advantage of reading the judgment of the learned President and respectfully agree with his conclusions and with the orders proposed by him.

I propose only to add a few words of my own upon the subject of the argument upon the meaning of the words “the security” where they appear in s. 3 (1) (b) of the Money-lenders’ Ordinance (Cap. 307 of the Laws of Kenya) as this is a point upon which I have entertained some doubt. The section reads as follows:

“3.(1) The provisions of this Ordinance shall not apply:

(a) to any money-lending transaction where the security for repayment

of the loan and/or interest thereon is effected by execution of a chattels transfer in which the interest provided for is not in excess of 9 per cent. per annum;

- (b) to any money-lending transaction where the security for repayment of the loan and/or interest thereon is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of money-lending upon such mortgage or charge.

“(2) The exemption provided for in this section shall apply whether the transactions referred to are effected by a money-lender or not.”

Mr. Mandavia’s argument was that the phrase in question was properly to be construed as “the only security” and that as in the present case promissory notes had been given, they also amounted to a security, and the case was therefore removed from the scope of the section. It is true, as the learned President points out in his judgment, that the promissory notes were signed only by the appellant and were therefore scarcely more than a mode of payment. They added neither security over property nor the personal liability of any other person, and there is a temptation to say that for that reason “the security” was the charge on land which was in fact the only security in that sense of the word. Nevertheless, I think that this is a temptation to be resisted, for in money-lending transactions it has been held that cheques are “securities for money” within the meaning of s. 2 (1) of the Money-lenders’ Act, 1900 (Imperial), of which the Kenya equivalent is s. 6 (3) (c) of the Ordinance. I refer to the case of *Stirling v. John* (11), [1923] 1 K.B. 557, which was relied upon by this court in *Vishvanath Chhaganlal Trivedi v. Korshed Kaiku Wadia* (12), [1959] E.A. 619 (C.A.). In *Stirling v. John* (11), the argument was advanced that the cheques were merely a means of payment but the Court of Appeal held that they were securities for money; at pp. 560–561 of the report the Master of the Rolls said:

“The evidence shows that both parties looked upon the giving of the post-dated cheques as a convenient method of repayment; neither of them thought they were giving or taking a security at all. But if these cheques were in fact ‘a security’ undoubtedly the money-lender took them. The question is were they securities for money? It seems to me, looking at the various Acts of Parliament in which cheques are referred to, and the expression ‘securities’ is used, that they were. The meaning of the word ‘securities’ is not confined to a document which gives a charge upon specific property. Undoubtedly the promissory note was a security for money and the cheques seem to me to stand upon the same footing.”

The section which was there being considered is not the same as that with which this court is now concerned, and of course the meaning of the word “security” in s. 3 (1) (b) is restricted by the context to mortgages and charges of immovable property. Nevertheless, in considering the argument advanced by Mr. Mandavia, I think the correct approach, under the guidance to be derived from *Stirling v. John* (11), is to regard the promissory notes as securities; it follows that it cannot be said that the two charges in the present case were in fact the only security, though the promissory notes added nothing which was of material value to the lender.

That being so it is necessary to come to a conclusion as to the meaning of the words “the security” in s. 3 (1) (b). I do not think that the use of the definite article necessarily favours Mr. Mandavia’s argument for the purpose of which he must insert, as he did in argument, the word “only”. On the other hand, a construction which would permit the operation of the section where

the mortgage or charge was not the only security, would also necessitate reading the word “the” as “a”, or some similar modification. Either construction appears to be open on the existing wording and I think that it must be resolved by a consideration of the intention of the legislature so far as it can be gathered from the section as a whole.

The first of the two exemptions from the operation of the Ordinance which the section creates is that contained in para. (1) (a) thereof, relating to transactions where the security is upon chattels and the interest does not exceed 9 per cent. per annum. Sub-section (2) makes it clear that both exemptions apply whether the lender is a money-lender or not. I think that it is a legitimate deduction (and not pure speculation) from the nature of the two exemptions that the legislature considered that borrowers who could put up these types of security were more likely to be men of some substance not requiring to the fullest extent in the case of chattel owners, or at all in the case of owners of immovables, the protection of this type of legislation. They would be less subject to extortionate practices as, offering securities of this nature, they could expect to find lenders outside the ranks of professional money-lenders, willing to lend at reasonable rates of interest.

It is, I think, advantageous to envisage a money-lending transaction secured both upon immovable property and chattels. If the interest rate were 12 per cent. per annum, there would appear at first glance to be conflict in that the transaction would be outside the scope of the Ordinance by virtue of s. 3 (1) (b) but within it by virtue of s. 3 (1) (a). If, however, the legislature considered that a borrower who could put up immovables as security needed no protection, the conflict is more apparent than real, for he could not be more in need of protection because he was able to put up both forms of security. On the other hand, if the interest rate on such a loan were 6 per cent. per annum then a strict application of the construction urged by Mr. Mandavia would defeat the object of the section completely. If each of the paras. (a) and (b) is to be read as referring to the “only” security, the inclusion of any other security in either case, would negative the exemption.

With these considerations in mind I conceive the position to be shortly this; that the words of the section allow of two alternative constructions; that the legislature plainly did not consider that a borrower offering immovables as security required the protection of the Ordinance; and that there can be no possible reason for imputing to the legislature a desire to bring such a borrower back within the protection of the Ordinance merely because he is able to provide other security in addition to the immovables. I would therefore hold that where, as in the present case, a money-lending transaction is secured by a mortgage or charge of immovable property, it is taken out of the scope of the Ordinance, whether or not security other than the immovable property has also been provided. For these reasons I agree that Mr. Mandavia’s contentions fail and s. 3 (1) (b) applies.

I would add that in the present case the transactions were held by the learned judge to be bona fide. The section, which has no counterpart in English legislation, appears to be open to abuse, and a case might well be imagined in which a security, purporting to invoke one of the exemptions in s. 3, was merely a colourable device to that end; it would of course be open to a court to so find, in which case the other provisions of the Ordinance would apply with full effect.

Appeal dismissed.

For the appellant:

GR Mandavia

For the first respondents:

BO'Donovan QC and *JK Winayak*

The second respondent did not appear and was not represented.

For the appellant:

Advocates: *GR Mandavia*, Nairobi

For the first respondents:

Winayak Johar & Co, Nairobi

Kanji and Kanji v R
[1961] 1 EA 411 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	24 May 1961
Case Number:	41/1961
Before:	Sir Alastair Forbes V-P, Gould JA and Sir Owen Corrie Ag JA
Appeal from:	H.M. High Court of Tanganyika–Law, J

[1] *Factory – Dangerous machinery – Breach of statutory duty – Duty to fence – “Securely fenced” – Test – Whether machinery dangerous – Factories Ordinance (Cap. 297), s. 23 (1) and s. 75 (T.) – Factories Act, 1937, s. 14 (1).*

[2] *Evidence – Facts especially within the knowledge of a person – Dangerous machinery – Machinery inspected five months after accident – Condition of machinery at time of accident – Whether burden of proof upon owner to prove condition when accident happened – Presumption that condition same as when inspected – Indian Evidence Act, 1872, s. 105 and s. 114.*

Editor’s Summary

The appellant firm was convicted under s. 23 (1) and s. 75 of the Factories Ordinance of causing bodily injury to a person by failing to fence securely the feed aperture of a sisal decorticating machine. The evidence was that an employee, while feeding sisal leaf into the machine, allowed his hand to go too far into the feed aperture so that it was caught and drawn into the machinery and resulted in the loss of his arm. The magistrate made a finding upon the condition of the machine on the date of the accident from the evidence of a factory inspector who had inspected the machine about five months after the accident. On appeal to the High Court the judge held *inter alia* that the magistrate was entitled to assume that the machine was in the same condition on the date of the accident as when inspected by the factory inspector; that if there had been any change in the condition of the machine, this was especially within the knowledge of the appellant firm and it was for them to establish under s. 105 of the Indian Evidence Act; and that the factory inspector’s evidence established that there was no fence or no secure fence

protecting the worker from the machinery. On further appeal it was submitted *inter alia* that the evidence of the factory inspector as to the condition of the machine five months after the accident could not establish the state of the machine at the date of the accident; that there was no presumption that the machine would remain in the same state for five months; that the judge erred in relying on s. 105 of the Indian Evidence Act to supply a gap in the prosecution case; and that the inspector's evidence did not establish that there was no fence or no secure fence protecting the worker from the machinery.

Held –

- (i) the judge was wrong to hold that a change occurring in the machine between the date of accident and the inspection by the factory inspector would be a matter “especially within the knowledge” of the appellants within s. 105 of the Indian Evidence Act.
- (ii) in a proper case a retrospective presumption may be drawn from a proved fact under s. 114 of the Indian Evidence Act, and in the instant case the evidence adduced provided some support for the presumption that the condition of the machine had not changed; accordingly the magistrate was entitled on the evidence to assume that there had been no material change.
- (iii) the test whether a machine is dangerous and securely fenced is an objective one, and the question is whether the employer ought reasonably to have foreseen the danger; the fact that the accident happened when the worker was operating the machine in a normal manner and without carelessness was a material factor

to take into account in considering whether the danger ought to have been foreseen.

(iv) there was ample evidence to support a finding that the danger was foreseeable.

Appeal dismissed.

Cases referred to:

(1) *Attygalle v. R.*, [1936] 2 All E.R. 116.

(2) *John Summers & Sons Ltd. v. Frost*, [1955] 1 All E.R. 870.

(3) *Mitchell v. North British Rubber Co. Ltd.*, [1945] S.C. (J.) 69.

(4) *Burns v. Joseph Terry & Sons Ltd.*, [1950] 2 All E.R. 987.

Judgment

The following judgment prepared by **Sir Alastair Forbes V-P:** was read by direction of the court: This is a second appeal from the conviction of the appellant firm by the district court of Morogoro of causing bodily injury to a person through contravention of the Factories Ordinance (Cap. 297) (hereinafter called “the Ordinance”), contrary to s. 75 read with s. 23 (1) of that Ordinance. The appellant firm on conviction was fined Shs. 1,000/–.

The particulars of the offence charged were that the appellant firm:

“did on or about April 16, 1960, at their sisal factory at Turiani in the Morogoro District of the Eastern Province fail to fence securely the feed aperture of a Raspador sisal decorticating machine, contrary to their duty under s. 23 (1) of the Factories Ordinance, 1950, and as a consequence of their said failure in duty, one Stephen Andrea suffered a bodily injury.”

There was a second count of failure to fence a dangerous part of a machine contrary to s. 23 (1) of the Ordinance, but it was not considered in view of the conviction of the appellant firm on the first and more serious charge.

The relevant words of s. 75 of the Ordinance are:

“75. If any person . . . suffers any bodily injury, in consequence of the occupier or owner of a factory having contravened any provision of this Ordinance . . . the occupier or owner of the factory shall, without prejudice to any other penalty, be liable to a fine not exceeding two thousand shillings . . .”

Sub-section (1) of s. 23 of the Ordinance, which the appellant firm was alleged to have contravened, reads as follows:

“23. (1) Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced:

“Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this sub-section shall be deemed to have been complied with if a device is provided which in the opinion of the chief inspector satisfactorily protects the operator from coming into contact with that part.”

The provisions of the Ordinance follow closely the corresponding provisions of the Factories Act, 1937,

and, in particular, the provisions of s. 23 (1) of the Ordinance are substantially identical with the provisions of s. 14 (1) of the

Factories Act, 1937. The English authorities on the construction and application of these provisions are therefore applicable in Tanganyika in relation to s. 23 (1) of the Ordinance, and I do not think their force is affected by a minor difference in the provisos to the respective sections.

The accident which gave rise to the charge against the appellant firm occurred on April 16, 1960, when one Stephen s/o Andrea, was working at a Raspador decorticating machine at the appellant firm's sisal factory. Stephen allowed the fingers of his left hand to get too far through the gap through which sisal leaf is fed into the machine, and his hand was caught and drawn into the machinery, resulting in the loss of his arm. The accident was duly reported by the appellant firm on April 27, 1960. At the trial evidence was given for the prosecution by Stephen, by one Ramadhani, a fellow workman employed at the sisal factory, and by a Mr. Parkins, a factory inspector who inspected the machine in question on September 9, 1960. A submission that there was no case to answer was rejected by the learned magistrate, and the defence then called one witness only, a Mr. Burgamascos.

The first two grounds of appeal on first appeal to the High Court were:

- "(1) There was no evidence as to the condition of the machinery in question on the material date, namely April 16, 1960, and the learned resident magistrate erred in making a finding as to the condition on the said date from the evidence of the witness, Mr. N. F. Parkins relating to its condition on September 9, 1960.
- "(2) The learned magistrate failed to direct himself as to the meaning of the words 'securely fenced' in s. 23 (1) of Cap. 297, and should have held that the prosecution had failed to prove either that there was no fence at all or that the machinery was not securely fenced."

On the first of these grounds, after reviewing the evidence the learned judge said:

"Mr. Fraser Murray for the appellants has submitted that as there was no evidence as to the machine's condition on the date of the accident, the court was not entitled to act on Mr. Parkins' evidence as to its condition five months later, or to hold that the machine was not securely fenced when the accident happened. I do not agree. A piece of machinery is unlikely to undergo physical change in a matter of months. If in fact the machine did undergo some change between April 16 and September 9, and in particular if this change was detrimental to the appellants, this would be a matter especially within the knowledge of the appellants, and thus for them to establish under s. 105 of the Indian Evidence Act as applied to this territory. In the absence of any evidence adduced by the defence in this respect, the learned magistrate was, in my opinion, entitled to assume that the machine was in the same condition on the date of the accident as when Mr. Parkins saw it."

On the second ground of appeal Mr. Fraser Murray, who also appeared for the appellant firm in this court, submitted *inter alia* that:

"The obligation to fence is absolute but only to the extent of avoiding dangers which may reasonably be foreseen."

In dealing with this ground the learned judge said, *inter alia*:

"As regards whether the learned magistrate directed himself as to the meaning of the words 'securely fenced', he set out in his judgment the authorities on which he relied, which deal with this point, including *R. v. Nassa Ginnors Ltd.* (2 T.L.R. 346) and *Burns v. Joseph Terry and Sons Ltd.* ([1951] 1 K.B. 454). *Burn's* case was considered and approved in *Summers*

& Sons Ltd v. Frost ([1955] 1 All E.R. 870); which in turn was approved in *Quintas v. National Smelting No.*, ([1960] 1 All E.R. 104).

“These cases lay down the correct principles, which are that there must be complete protection against contact for workers, not however to the extent of requiring a fence which cannot be broken down by a worker who is determined to get at the machinery, but which is such as to guard against accident taking into account human weaknesses such as forgetfulness, inadvertence and even an inclination to take minor risks. I have no reason to doubt that the learned magistrate had these principles in mind when he arrived at his finding that the appellants had failed to secure the machine.”

On appeal to this court the grounds of appeal set out in the memorandum of appeal are as follows:

- “(1) The learned judge erred in law in applying s. 105 of the Indian Evidence Act and in holding that the question whether the machine underwent some change between April 16 and September 9, was a matter specially within the knowledge of the appellants. The learned judge should have held that it was for the prosecution to prove that the machine was in the same condition on April 16, the date of the accident, as it was on September 9, the date of examination by Mr. Parkins. This was not a matter peculiarly within the knowledge of the appellants and evidence could have been called on behalf of the prosecution to this effect, if it had been the case. The effect of the learned judge’s decision was to transfer to the accused in a criminal case the burden of proving his innocence.
- “(2) The learned judge erred in law in holding that Mr. Parkins’ evidence established that there was no fence or no secure fence protecting the worker from the machinery.”

On the first of these grounds Mr. Fraser Murray argued that the evidence of Mr. Parkins as to the condition of the machine some five months after the accident could not establish the state of the machine at the date of the accident; that there was no presumption that the machine would remain in the same state for five months; and that the learned judge was wrong to rely on s. 105 of the Indian Evidence Act to supply a gap in the prosecution case.

On the second ground Mr. Fraser Murray submitted that neither court below appreciated that the essential question was whether the machine was in such a state as to guard against foreseeable danger, and consequently did not consider the evidence from this point of view; and that in fact there was no evidence that the danger was foreseeable.

It may be said at once that most of the difficulty in this case, which has now resulted in two appeals, stems from the sketchy manner in which the prosecution case was presented in the magistrate’s court. A few questions to one or other of the prosecution witnesses would have sufficed to establish beyond question the matters which are now challenged. However, the appellant firm is entitled to take any advantage it can from deficiencies in the prosecution case, and it is therefore necessary to consider whether on the case as presented there was evidence to support the conviction. On second appeal this court is restricted by s. 325 of the Criminal Procedure Code to consideration of questions of law only.

As regards the first ground of appeal, we think, with great respect, that the learned judge was wrong to hold that a change occurring in the machine during the five months that elapsed between the accident and the inspection by Mr. Parkins would be a matter “especially within the knowledge” of the appellant firm within s. 105 of the Indian Evidence Act. It is well established that that section does not cast upon an accused person the burden of proving that no crime

has been committed, *Attygalle v. R.* (1), [1936] 2 All E.R. 116. But, apart from that, it is evident that the prosecution would have had no difficulty in finding a witness to state categorically whether or not there had been any material change in the machine between April and September, and therefore the matter could not be said to be one especially within the knowledge of the appellant firm.

This, however, was not the basis of the decision of the learned magistrate. The learned magistrate said:

“The employee—Stephen—described how he was feeding sisal leaf, with his left hand, into the Raspador decorticator, the leaf being pushed through a gap about 2 inches high, the length of the gap being about 18 inches and a distance of 5½ inches between the gap and the cutters inside the machine. It would appear that the sisal leaf was decorticated at one end, pulled out and placed in again, the other end then being stripped and the fibre remaining. Stephen allowed his hand to go through the gap and the next thing he knew was that his hand was caught in the cutters, dragged further in, and the arm amputated. Ramadhani (3rd P.W.) said he did not put his hand through the gap as he knew it was dangerous.

“Examination of the machine by Mr. Parkins in September, 1960, revealed no barrier or fence to protect the employees. Both Stephen and Ramadhani indicated that their hands went to the gap and it is clear there was little or no protection save the 5½ inch length between the gap and the cutters. The fact that Stephen was injured is material. The failure to fence is not to be excused by protesting that it is impracticable and the fact that an old machine is used, as in the present case does not lessen the obligations of the defendants.”

There is no apparent misdirection in this passage, but it is said that there might have been some form of fence or other device on the machine in April which was not there in September and that this possibility had not been negatived; that there could be no presumption that the machine was in the same state in April as it was in September; that the mere fact of the accident did not establish that the machine was dangerous in April; and that there was no evidence on which the learned magistrate could find that it was not securely fenced in April. Mr. Fraser Murray stressed Mr. Parkins’ reply in answer to the court when he said:

“The only protection the feeder can have is by distance between his hands and the cutters or possibly by a rubber barrier at the gap which would prevent his hands going beyond the gap; there may be other protections”;

and argued that it was quite possible that some such protection had existed in April. He asked this court to lay down as a matter of law that the date of the inspection of the machine in September was so remote from the date of the accident that no presumption could be drawn from it as to the state of the machine at that time.

The relevant section of the Indian Evidence Act is s. 114, which reads:

“114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case.”

Illustration (d) of the illustrations set out to the section is relevant to this case, and it reads:

“The court may presume—

.....

“(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

.....

“But the court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular one before it:

.....

“as to illustration (d)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course”.

The learned author of Sarkar on Evidence (10th Edn.) at p. 901 remarks that s. 114 “crystallises the principle of ordinary common sense”. At p. 910 he says, in relation to illustration (d):

“This illustration is founded on the presumption in favour of continuance or immutability. It is a very general presumption founded on the experience of human affairs, that persons, states of mind or things once proved to have existed previously or subsequently in a particular state are to be understood as persisting or continuing in that state until the contrary is established by evidence either direct or circumstantial . . .

“ ‘I am to presume a thing always in the state in which it is found, unless I have evidence that at some previous time it was in a different state’ (per Best, J., in *R. v. Burdett*, 4 B. & Ald. 95, 124) . . .

“The presumption of continuance which is one of fact and not of law, will, however weaken with the remoteness of time, and only prevails till the contrary is shown, or a different presumption arises from the nature of the case . . .

“The limits of time within which inference of continuance possesses sufficient probative force to be relevant, must obviously vary with each case—always strongest at the beginning, the inference steadily diminishes in force with the lapse of time at a rate proportionate to the quality of permanence belonging to the fact in question . . .

“So far then as the interval of time is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control . . .”

The above extracts from Sarkar are substantially in accord with the corresponding English law on the subject as set out in Halsbury’s Laws of England (3rd Edn.) Vol. 15 at p. 283, and we accept them as a correct statement of the law in relation to the instant case.

Mr. Fraser Murray, following a passage to that effect in Sarkar at p. 912, argued at one point that s. 114 did not enable a court to presume backwards. However, he subsequently conceded the passage in question to be of doubtful authority. The cases cited by Sarkar as authority for the proposition are all decisions of the courts of Calcutta. With respect, we are unable to agree that the passage is good law. It is in conflict with passages in the extracts set out above, and is not the law in England—Halsbury (*supra*) p. 283. Indeed it is in conflict with the first of the illustrations to s. 114 of the Evidence Act, which relates to the well-known rule that a person found in possession of property recently stolen may in the absence of an explanation be presumed to be the thief. We see nothing in the wording of s. 114 to justify the proposition and are of opinion that in a proper case a retrospective presumption may be drawn from a proved fact.

Applying the law as stated above to the facts of the instant case, we are quite unable to say that the learned magistrate was wrong in law to presume that the machine in question was in the same condition in April as it was in September. It is true that a substantial period of time intervened, but, as the learned judge said, a piece of machinery is unlikely to undergo physical change in a matter of months. In addition, the evidence in fact provided some support for the presumption that the condition of the machine had not changed. There is no need to set out this evidence in detail, but the account given by Stephen and Ramadhani of the manner in which they operated the machine tallies exactly with the description of the manner of operating the machine given by Mr. Parkins. In the absence of any suggestion that some difference existed, we think the learned magistrate was entitled on the evidence to assume that there had been no material change in the condition of the machine.

The first ground of appeal accordingly fails.

The second ground of appeal is to some extent involved with the first since Mr. Parkins' description of the machine and the method of operation is sufficient to enable a court to form its own conclusion as to the foreseeability of danger. The test to be applied is concisely stated by Viscount Simonds in *John Summers & Sons Ltd. v. Frost* (2), [1955] 1 All E.R. 870 at p. 873, where he says:

"The next question is what is the test or standard of secure fencing . . . An observation of Du Parcq, J., in *Walker v. Bletchley Flettons, Ltd.*, [1937] 1 All E.R. at p. 175) to the effect that a machine is dangerous:

'if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur'

has been sometimes mentioned with approval, and I think that it gives as precise a direction as can be hoped for if it is read in conjunction with what the Lord Justice-Clerk (Lord Cooper) said in *Mitchell v. North British Rubber Co. Ltd.*, ([1945] S.C. (J.) 69 at p. 73), viz. that a machine is dangerous if:

'... in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operative intent upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from the unguarded part,'

So long as this element of danger exists the machine is not securely fenced."

In the same case (at p. 883) Lord Reid cited with approval the following passage from the judgment of the Lord Justice-Clerk (Lord Cooper) in *Mitchell v. North British Rubber Co. Ltd.* (3), [1945] S.C. (J.) 69, which includes that cited by Viscount Simonds:

"The necessary and sufficient condition for the emergence of the duty to fence imposed by s. 14 of the Factories Act is that some part of some machinery should be 'dangerous'. The question is not whether the occupiers of the factory knew that it was dangerous; nor whether a factory inspector had so reported; nor whether previous accidents had occurred; nor whether the victims of these accidents had, or had not, been contributorily negligent. The test is objective and impersonal. Is the part such in its character, and so circumstanced in its position, exposure, method of operation and the like, that in the ordinary course of human affairs danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operative intent upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from unguarded part?"

Later in his judgment (at p. 885) Lord Reid said:

“For the respondent, it was argued that the mere fact that a person is injured by coming into contact with the dangerous part shows that it was not securely fenced because ‘securely fenced’ means fenced against all dangers whether foreseeable or not. This matter was considered by the Court of Appeal in *Burns v. Joseph Terry & Sons, Ltd.*, and the respondent relied on the dissenting judgment of Denning, L.J. I agree with the judgment of Somervell, L.J. (as my noble and learned friend then was). Apart from other considerations, the terms of s. 14 (1) itself appear to me to require this conclusion. The sub-section requires fencing unless the dangerous part is in such a position, or of such construction, as to be as safe as it would be if securely fenced. If ‘securely fenced’ means fenced against foreseeable danger, then it is possible to say in advance that the dangerous part is in such a position that there is no foreseeable danger and, therefore, it is as safe as if it was fenced. But, if ‘securely fenced’ means fenced against all danger, even if unforeseeable, and an unforeseeable accident occurs, then the event proves that the unfenced part was not as safe as if it had been fenced. As one cannot foresee the unforeseeable, I do not see how, on this view, one could ever say in advance that any dangerous part left unfenced was as safe as it would be if securely fenced, because there would always be the chance of some unforeseeable accident happening, and proving that that part had not, in fact, been as safe as it would have been if fenced.”

In *Burns v. Joseph Terry & Sons Ltd.* (4), [1950] 2 All E.R. 987 at p. 990 Somervell, L.J., said:

“I think that in this group of sections the same test should be applied in deciding whether machinery is ‘securely fenced’ as is applied in deciding whether it is ‘dangerous’. To an allegation that machinery which has, in fact, caused injury is dangerous it is admittedly a good answer to prove that it was not dangerous in any reasonably foreseeable circumstances. I see no difficulty in applying the same test to the question whether machinery is securely fenced.”

It is clear therefore that the test of foreseeability applies both to the question whether a particular part of a machine is dangerous, and to whether it is “securely fenced”; and in each case the mere fact that an accident has happened is not conclusive. In the instant case it was argued that the learned magistrate was wrong in taking into account the fact of the accident when he said “The fact that Stephen was injured is material”. However, we do not read the above-mentioned cases as authority for the proposition that the circumstances of an accident are wholly irrelevant to the question of foreseeability. The test is objective, and the question is whether the employers ought reasonably to have foreseen the danger. The fact that the accident happened in the instant case when Stephen was operating the machine in a normal manner and apparently—it was not suggested otherwise—without carelessness or foolhardiness, appears to us to be a material factor to take into account in considering whether the particular danger ought to have been foreseen. We do not think the learned magistrate meant more than this in his judgment.

Apart from this, however, we think there was ample evidence to support a finding that the danger of this particular piece of machinery was foreseeable. The description of the machine and its method of operation given by Mr. Parkins makes it clear that it was inherently dangerous, and was sufficient to enable the court to conclude for itself that there was foreseeable danger. In addition there was the evidence of Mr. Parkins that “a Raspador is regarded as a dangerous machine”; of Ramadhani that “I do not put my hands into the gap; it is dangerous”; and of Mr. Burgamascos, the defence witness, that

“Raspadors are not safe machines and I would condemn them all”. This evidence indicates not merely that the danger was foreseeable, but that it had in fact been generally foreseen by persons acquainted with the machine or that type of machine.

It is complained that neither the learned magistrate nor the learned judge on first appeal applied his mind to the question of foreseeability. It is true that in neither judgment was the point expressly mentioned, but both the learned magistrate and the learned judge made reference to authorities where the question was considered and we see no reason to think they overlooked that aspect of the matter. We think it implicit in their judgments that they accepted that the danger was foreseeable, and on the evidence we do not think any other conclusion possible.

It follows that we think the second ground of appeal also must fail, and the appeal is accordingly dismissed.

Appeal dismissed.

For the appellants:

WD Fraser Murray

For the respondent:

TW Lane (Crown Counsel, Tanganyika)

For the appellants:

Advocates: *Fraser Murray, Thornton & Co*, Dar-es-Salaam

For the respondents:

The Attorney-General, Tanganyika

Ottoman Bank v Hanna Ghaui [1961] 1 EA 419 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam

Date of Judgment: 9 December 1960

Case Number: 63/1960

Before: Simmons J

[1] *Bank – Memorandum of deposit – Deposit of title to land – Security for advances to third party – No reference to personal liability of depositor – Whether depositor personally liable for advances – Conveyancing and Law of Property Act, 1881, s. 25 – Land (Law of Property and Conveyancing) Ordinance (Cap. 114), s. 25 (T.) – Indian Code of Civil Procedure, 1908, O. 34, r. 1, r. 2, r. 6.*

[2] *Bank – Memorandum of deposit of title deeds – Undertaking to execute legal mortgage – Security*

for advances – Default of borrower – Whether bank entitled to order for sale before legal mortgage executed – Conveyancing and Law of Property Act, 1881, s. 25 – Land (Law of Property and Conveyancing) Ordinance (Cap. 114), s. 25 (T).

Editor's Summary

At the request of the defendant, Ghau, the plaintiffs had made advances to a company, H. Ghau & Co. Ltd., on the security of two memoranda of deposit according to which the documents of title of certain property at Dar-es-Salaam were deposited with the plaintiffs on terms that the property was to be “a continuing security for payment . . . on demand of any banking facilities and accommodation granted to” the company. The plaintiffs eventually sued the defendant claiming a declaration that they were legal mortgagees of the land, an order that Shs. 425,174/17 was due to the plaintiffs or for an account of what was due to them from the defendant, interest thereon, and an order for payment or for sale in default. The defendant claimed that by the terms of the memoranda, firstly, the defendant was not personally liable, as a mortgagor is who mortgages his property to secure his own debt, and, secondly, that the plaintiffs were only entitled to call for execution of a legal mortgage and not

for an order for sale. The plaintiffs relied on the phrase that the property was “a continuing security for payment . . . on demand” and claimed that “on demand” meant “on demand from the defendant”; they also relied upon s. 25 of the Conveyancing and Law of Property Act, 1881.

Held –

- (i) the words “on demand” meant “on demand from H. Ghau & Co. Limited” and since the memoranda did not refer to personal liability and had been settled by the plaintiffs’ advocates there was no reason to infer that personal liability was intended.
- (ii) the plaintiffs had a memorandum by which the depositor had agreed to execute a legal mortgage and were not debarred from a remedy merely because a legal mortgage had not in fact been executed; accordingly there would be a preliminary decree ordering an account under O. 34, r. 2 (a).

Order accordingly.

[**Editorial Note:** an appeal by the plaintiffs from this decision immediately follows this report.]

Cases referred to:

- (1) *Re Conley*, [1938] 2 All E.R. 127.
- (2) *Barclays Bank D.C.O. v. Gulu Millers Ltd.*, [1959] E.A. 540 (C.A.).

Judgment

Simmons J: This is a suit, filed by a banking company, arising out of two memoranda executed by the defendant in pursuance of an agreement with the plaintiffs. It is only necessary to set out one of these memoranda in full:

“Tanganyika

Stamp Duty Shs. 20/- Paid

Receipt No. A. 69527 of 12.12.58

S. R. Woodland

Registry Superintendent

Dar-es-Salaam

25th November, 1958.

To,

Ottoman Bank,

Dar-es-Salaam

Memorandum of Deposit

In consideration of your agreeing at my request to grant banking facilities and accommodation to H. Ghau & Company Limited and for any advances which you have made or may make to the said company I deposit with you herewith the document of title mentioned below to the intent that the property to which it relates may be a continuing security for payment to you on demand of any banking facilities and accommodation granted to the said H. Ghau & Company Limited and/or for any advances which you have made or may make to the said H. Ghau & Company Limited and for any balances which may be due to you from the said H. Ghau & Company Limited whether jointly or severally and either as principal or surety now or hereafter or remaining

unpaid on any account not exceeding in the aggregate the sum of shillings four hundred thousand (Shs. 400,000/-) with charges for interest at the rate of 7 per cent. per annum or at such other rate as you may from time to time stipulate with monthly rests discount commission and other usual banking charges. And I charge

all my estate and interest in such property with payment on demand of all money now due or hereafter to become payable hereunder and undertake if and when required to execute at my own expense a valid legal mortgage with all proper provisions of such estate and interest to you to secure payment on demand of all moneys owing and intended to be secured by this security including the enforcement thereof.

List of Deposited Document

Certificate of Title to Freehold Land being all that piece or parcel of land at Upanga in the Municipality of Dar-es-Salaam containing twenty two thousand, six hundred and twenty-six (22,626) square feet or thereabouts being plots Nos. 103/27 and 104/27 of the Upanga Area, Dar-es-Salaam as delineated and edged in red on the plan annexed to the said Certificate of Title to Freehold Land bearing Title No. 7091 and thereon numbered 10.

Sgd. H. Ghai

Hanna Ghai.”

The other memorandum was similar and was in consideration of further advances of Shs. 20,000/- to H. Ghai & Company.

The plaintiff company pray for the following relief:

- “1. A declaration that under and by virtue of the memoranda of deposit hereinbefore mentioned the plaintiffs are entitled to be considered as legal mortgagees of the land comprised in the title deed and the deeds referred to in the said memoranda of deposit.
2. An order that the sum of Shs. 425,174/17 is due from the defendant to the plaintiffs or an account be taken of what is due to the plaintiffs from the defendant under and by virtue of the said memorandum of deposit and supplemental memorandum of deposit.
3. Interest at the rate of 9½ per cent. per annum with monthly rests on the amount due to the plaintiffs from the first day of July, 1960, until payment.
4. A declaration that the said sum due to the plaintiffs or on taking of the accounts as aforesaid the sum found due is to be considered as being a charge on the said mortgaged properties.
5. Costs of this suit.
6. An order for payment of the said sum and in default that the said mortgages may be enforced by sale of the lands comprised in the said certificate of title and other title deeds.
7. In case the proceeds of sale are found to be insufficient to pay the decretal amount due to plaintiffs then liberty be reserved for the plaintiffs to apply for a personal decree against the defendant.
8. Such further or other order as the nature of the case may require.”

The suit came before me for argument on preliminary points of law. The learned deputy registrar ordered that it should be set down for such argument. An unsatisfactory feature of this order is that there is nothing on record to show exactly what were the preliminary points to be argued. Learned counsel was, in fact, partly taken by surprise. I do not think that an order of this kind should be made quite so informally. It is, in my view, desirable, to say the least, that an application for such an order should be made on chambers summons setting forth the point or points which it is desired to argue in limine. The registrar should then consider whether the point is such that a decision

on it favourable to one of the parties would substantially dispose of the suit; if so, or if there is a reasonable prospect of a substantial amount of costs being saved, and if no dispute of fact arises, it may be proper to set it down for preliminary hearing: otherwise a more expeditious and less costly solution might be to leave the points to be decided by the trial court together with the rest of the issues. I am not trying to lay down any rule but am pointing out certain factors of which account should be taken. In this case counsel have agreed that there is no witness evidence to be called and that the decree will follow the result of the argument.

The first submission by learned counsel for the defendant was that the defendant did not undertake personal liability in the manner of a mortgagor who mortgages property to secure his own debt. He conceded that where the mortgagor was himself the borrower there was an implied contract that he was personally liable to repay the loan, and that the mortgagee could proceed against the mortgagor personally, in addition to enforcing his security, as though there were an express personal covenant. He cited authorities in support of this but distinguished them all from the present case on the ground that the defendant is the mortgagor but is not the borrower. He could cite no authority directly in support of this distinction—and his opponent could cite none against it. It is difficult to believe that the point is free from authority but I accept the assurance of these highly experienced advocates that such is the case.

Argument was necessarily confined to the discussion of analogies, one of which was the proposition, conceded by Mr. Lockhart-Smith to be correct, that the assignee of an equity of redemption is not liable to be sued on the covenant for payment of the mortgage debt. This follows from the fact that the covenant is not one which runs with the land. I can see a little force in this because the defendant has put himself in the position in which he would have found himself had the land originally belonged to Ghauri & Company and had he acquired the equity of redemption from them. Mr. Thornton also cited Sarkar on Civil Procedure (3rd Edn.), commenting on O. 34, r. 6. A similar comment is found in Mulla (9th Edn.):

“In India a mortgage does not necessarily import a personal obligation to repay . . . In each case the question is one of construction of the mortgage instrument . . .”

Another line of Mr. Thornton’s argument was based on *Re Conley* (1), [1938] 2 All E.R. 127, 134. The wife of a bankrupt deposited with a bank a loan as collateral security for the bankrupt’s indebtedness. The point directly in issue is not relevant to-day but Luxmoore, J., (as he then was) said at p. 134:

“ . . . The trustee in bankruptcy argued before this court (i) that the mother and wife are under personal liability to the banks in respect of the overdrafts . . .

“ . . . So far as the first point is concerned, the respective contracts between the depositors and the banks are in each case regulated by a written document. In none of these documents is there any express provision that the depositor is to be under any personal liability, and I am unable to appreciate on what ground it can properly be said that personal liability is to be implied, and what is to be its limit. I am satisfied from an examination of the material documents that the intention of the parties in each case was to limit the depositor’s liability to the amount of the security deposited, and to exclude any personal liability on the part of the depositor. In my judgment, there is no substance in the first point.”

It was submitted that here, too, it is the duty of the court to construe the memoranda, and there are no grounds for saying that personal liability is implied.

Mr. Lockhart-Smith, for the plaintiff company, referred to the terms of the memoranda themselves. He cited the following passage from annexure 1 (and a similar passage from annexure 2):

“... I deposit with you herewith the document of title mentioned below to the intent that the property to which it relates may be a continuing security for payment to you on demand of any banking facilities and accommodation granted to the said H. Ghau & Company Limited . . .”

He submitted that the words “on demand” mean “on demand from the defendant”. I can only say that I differ; they seem to me clearly to mean “on demand from Ghau & Company”.

On the first point I find in favour of the defendant. I have to construe the memoranda—which appear to have been settled by the plaintiffs’ advocates. There is no mention of personal liability going beyond the mortgage, and I see no reason for inferring that it was intended. Luxmoore, J.’s words are apt to this case, and none of the reasons exist here which exist, when the mortgagor is also the borrower, for implying personal liability.

Mr. Thornton’s next submission was that the prayer for sale in default of payment should not be allowed. He conceded that the plaintiffs had the right to demand the execution of a legal mortgage but no more. Mr. Lockhart-Smith relied on s. 25 of the Conveyancing and Law of Property Act, 1881, which (he submitted) applies to Tanganyika in virtue of s. 2 of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114, Supp. 58). Section 25 is as follows:

- “(1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.
- “(2) In any action whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum fixed by the court, to meet the expenses of sale and to secure performance of the terms.
- “(3) But, in an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.
- “(4) In any case within this section the court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.
- “(5) This section applies to actions brought either before or after the commencement of this Act.

.....

- “(7) This section does not extend to Ireland.”

Mr. Thornton contends that this section must be read subject to the provisions of the Indian Code of Civil Procedure, which no doubt it must.

The final submission of Mr. Thornton is that an account should not be ordered because Ghau & Company are not parties; the defendant cannot compel them to be examined on their accounts and the court cannot compel them to bring their accounts in. I am not at all sure that there is this lack of compulsive powers but in any case it is for the plaintiff company to lead the necessary evidence and to bring in all accounts and relevant information.

I have not overlooked O. 34, r. 1:

“Subject to the provisions of this code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.”

Mr. Thornton has not argued that Ghau & Company have an interest in the mortgage-security or in the right of redemption. I do not regard O. 34, r. 1, as a stumbling-block in the path of the plaintiff company. *Barclays Bank D.C.O. v. Gulu Millers Ltd.* (2), [1959] E.A. 540 (C.A.) is clear authority for the proposition that, in Uganda at least, irrespective of s. 25 of the Conveyancing Act, 1881, where there is an equitable mortgage by deposit of documents of title accompanied by a memorandum by the depositor agreeing to execute a legal mortgage with an unqualified power of sale, the court has power to order a sale—and also a foreclosure. Here there is a memorandum by the depositor agreeing to execute a legal mortgage (though no power of sale is mentioned). The plaintiff company are not debarred from a remedy merely because a legal mortgage has not in fact been executed.

There will be a preliminary decree ordering an account under O. 34, r. 2 (a) and containing a direction under r. 2 (c), the period under the latter being three months from confirmation of account.

Order accordingly.

For the appellant:

WJ Lockhart-Smith and AJ Kanji

For the respondent:

RS Thornton

For the plaintiff:

Advocates: *Satchu & Satchu*, Dar-es-Salaam

For the defendant:

Fraser Murray, Thornton & Co, Dar-es-Salaam

Ottoman Bank v Hanna Ghau [1961] 1 EA 425 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	13 May 1961
Case Number:	18/1961
Before:	Sir Alastair Forbes V-P, Gould JA and Sir Owen Corrie Ag JA

Appeal from: H.M. High Court of Tanganyika–Simmons, J

[1] *Bank – Memorandum of deposit – Deposit of title to land – Security for advances to third party – No reference to personal liability of depositor – Whether depositor personally liable for advances – Tanganyika Order-in-Council, 1920, art. 17 (2) (T.) – Conveyancing and Law of Property Act, 1881, s. 25 – Land (Law of Property and Conveyancing) Ordinance (Cap. 114), s. 2 (T.) – Land Registration Ordinance (Cap. 334), s. 41, s. 43, s. 62, s. 64 (T.) – Indian Code of Civil Procedure, 1908, O. 34, r. 2, r. 4.*

[2] *Bank – Memorandum of deposit of title deeds – Undertaking to execute legal mortgage – Security for advances – Default of borrower – Whether bank entitled to order for sale before legal mortgage executed – Conveyancing and Law of Property Act, 1881, s. 25 – Land (Law of Property and Conveyancing) Ordinance (Cap. 114), s. 25 (T.).*

[3] *Mortgage – Enforcement of security – Action seeking order for sale – Appropriate order where mortgage succeeds – Indian Code of Civil Procedure, 1908 – O. 34, r. 2, r. 4 – Land (Law of Property and Conveyancing) Ordinance (Cap. 114), s. 2 (T.).*

Editor’s Summary

This appeal was brought against the decision of the High Court which is reported immediately before the report of this appeal (see p. 419). At the hearing of the appeal it was submitted for the appellants that, as in the case of an ordinary mortgage, personal liability ought to be implied even if not expressly so provided, and that under s. 62 and s. 64 of the Land Registration Ordinance certain covenants including a personal covenant to pay the principal is to be implied in every registered mortgage and *inter alia*, since the appellants were entitled to have a valid legal mortgage with all proper provisions executed by the respondent, the equitable mortgage of the appellants must be subject to the same implied covenants.

Held –

- (i) the appropriate order in a suit for sale if the plaintiff succeeds is similar to that in a suit for foreclosure, subject to sale instead of foreclosure, after expiration of the time allowed for redemption.
- (ii) the order made by the judge under O. 34, r. 2 must be varied to make it an order for sale in terms of O. 34, r. 4.
- (iii) under s. 43 of the Land Registration Ordinance any covenant implied under the Ordinance may be negated by express provision; accordingly the covenants under s. 62 are not absolute covenants.
- (iv) “all proper provisions” must mean all proper provisions to give effect to the liability of the respondent under the memorandum and if, upon a true construction, the memorandum imposes no personal liability, the respondent is entitled to have a clause inserted in the legal mortgage that no personal liability is involved.

Appeal dismissed. Order of the High Court varied.

Case referred to:

- (1) *Re Conley*, [1938] 2 All E.R. 127.

May 12. The following judgments were read:

Judgment

Sir Alastair Forbes V-P: This is an appeal from a judgment and decree of the High Court of Tanganyika. The appellant bank (hereinafter called “the bank”) had, at the request of the respondent, granted banking facilities and accommodation to H. Ghau & Company Ltd. (hereinafter referred to as “the company”) and the respondent had, by way of security therefor, executed two “memoranda of deposit” and deposited with the bank the documents of title of the properties referred to in the memoranda. The first of these memoranda, dated November 25, 1958, was expressed to be in respect of any balances which might be due to the bank from the company on any account not exceeding in the aggregate the sum of Shs. 400,000/- together with interest and usual banking charges. The second memorandum, dated February 17, 1960, was expressed to be supplemental to the first memorandum of deposit and was in respect of further accommodation to the extent of Shs. 20,000/-. The bank’s lien over the property mentioned in the first memorandum was registered under s. 64 of the Land Registration Ordinance (Cap. 334), and the second memorandum was registered in the Registry of Documents at Dar-es-Salaam. The bank in its plaint alleged that on June 30, 1960, there was due and owing to the bank by the company a sum of Shs. 425,174/17 and that no part of that sum had been paid by either the company or the respondent despite demand. The bank accordingly prayed:

- “1. A declaration that under and by virtue of the memoranda of deposit hereinbefore mentioned the plaintiffs are entitled to be considered as legal mortgagees of the lands comprised in the title deed and the deeds referred to in the said memoranda of deposit.
- “2. An order that the sum of Shs. 425,174/17 is due from the defendant to the plaintiffs or an account be taken of what is due to the plaintiffs from the defendant under and by virtue of the said memorandum of deposit and supplemental memorandum of deposit.
- “3. Interest at the rate of 9½ per cent. per annum with monthly rests on the amount due to the plaintiffs from the first day of July, 1960, until payment.
- “4. A declaration that the said sum due to the plaintiffs or on taking of the accounts as aforesaid the sum found due is to be considered as being a charge on the said mortgaged properties.
- “5. Costs of this suit.
- “6. An order for payment of the said sum and in default that the said mortgages may be enforced by sale of the lands comprised in the said certificate of title and other title deeds.
- “7. In case the proceeds of sale are found to be insufficient to pay the decretal amount due to the plaintiffs then liberty be reserved for the plaintiffs to apply for a personal decree against the defendant.
- “8. Such further or other order as the nature of the case may require.”

At the trial the facts stated in the plaint were not contested by the respondent, but certain legal submissions were made on his behalf. Arising out of these the learned judge held (a) that under the two memoranda of deposit the respondent was under no personal liability for the debts of the company going beyond the mortgage; and (b) that the bank was not debarred from a remedy merely because a legal mortgage had not in fact been executed in pursuance of the terms of the memoranda of deposit; and he ordered:

“There will be a preliminary decree ordering an account under O. 34, r. 2 (a) and containing a direction under r. 2 (c), the period under the latter being three months from confirmation of account.”

The bank now appeals against the learned judge’s decision that the respondent is under no personal liability, and against the learned judge’s order for a preliminary decree under O. 34, r. 2, which, in effect, is an order for foreclosure, when the remedy sought was sale and not foreclosure.

So far as the second point is concerned Mr. Thornton for the respondent conceded that a power to order sale did exist; and agreed that the learned judge’s order should be varied accordingly, the only point of difference between the parties being that Mr. Thornton submitted that the customary period for redemption in the case of an order for sale under an equitable mortgage should be six months and not three, which Mr. Lockhart Smith for the bank was not prepared to concede. In the circumstances it is hardly necessary to touch on the second point, but as we did hear argument on it I will express an opinion briefly on the questions raised.

In the first place the learned judge made no very clear finding whether or not s. 25 of the Conveyancing Act, 1881, on which Mr. Lockhart Smith relied, applied in Tanganyika, but did agree with Mr. Thornton that it must be read subject to the provisions of the Indian Code of Civil Procedure, which is in force in Tanganyika. The relevant statutory provisions are art. 17 (2) of the Tanganyika Order-in-Council, 1920, and s. 2 of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114). Article 17 (2) applies to the territory

“the common law, the doctrines of equity and the statutes of general application in force in England at the date of this order”,

subject, however, to applied Indian Acts and local Ordinances, past or future. Section 2 of the Land (Law of Property and Conveyancing) Ordinance reads as follows:

- “2.(1) Subject to the provisions of this Ordinance, the law relating to real and personal property, mortgagor and mortgagee, landlord and tenant, and trusts and trustees in force in England on the first day of January, 1922, shall apply to real and personal property, mortgages, leases and tenancies, and trusts and trustees in the territory in like manner as it applies to real and personal property, mortgages, leases and tenancies, and trusts and trustees in England, and the English law and practice of conveyancing in force in England on the day aforesaid shall be in force in the territory.
- “(2) Such English law and practice shall be in force so far only as the circumstances of the territory and its inhabitants, and the limits of Her Majesty’s jurisdiction permit.
- “(3) When such English law or practice is inconsistent with any provision contained in any Ordinance or other legislative act or Indian Act for the time being in force in the territory, such last mentioned provision shall prevail.”

No provision of the local law or applied Indian Acts inconsistent with s. 25 of the Conveyancing Act, 1881, was brought to our attention, except O. 34 of the Civil Procedure Rules, so far as that can be said to be inconsistent with the section. I have little doubt that s. 25 does apply in Tanganyika, but I agree with the learned judge that it must be read subject to the Indian Code of Civil Procedure, in particular, O. 34. Mr. Lockhart Smith argued that O. 34 was framed with reference to the Indian Transfer of Property Act, which never has been in force in Tanganyika, and so should not be read as applicable to s. 25 of the Conveyancing Act, 1881. However, O. 34, whatever its origin, is in force in this territory and the application of O. 34 in conjunction with s. 25

does not appear to present any difficulty. I consider the two should be read together, and I think this is what the learned judge intended to do. The material provisions of O. 34—it is to be noted that it is the old O. 34 as set out in the note to the Order in Mulla's Code of Civil Procedure (10th Edn.) which applies in Tanganyika and not the new order introduced in India by the Transfer of Property (Amendment) Supplementary Act, 1929—the material provisions of O. 34 as it applies in Tanganyika are contained in r. 2 and r. 4 and are:

- “2. In a suit for foreclosure, if the plaintiff succeeds, the court shall pass a decree:
- (a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or
 - (b) declaring the amount so due at the date of such decree, and directing—
 - (c) that if the defendant pays into court the amount so due on a day within six months from the date of declaring in court the amount so due to be fixed by the court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims, by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but
 - (d) that, if such payment is not made on or before the day to be fixed by the court, the defendant shall be debarred from all rights to redeem the property.”

.....

- “4.(1) In a suit for sale, if the plaintiff succeeds, the court shall pass a decree to the effect mentioned in cl. (a), cl. (b) and cl. (c) of r. 2 and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.”

Thus the appropriate order in a suit for sale if the plaintiff succeeds is similar to that in a suit for foreclosure, subject to sale instead of foreclosure after the expiration of the period allowed for redemption. I am inclined to think the learned judge intended his order to be an order for sale and that it was through inadvertence that mention of r. 4 of O. 34, was omitted. However that may be, the order must, as was agreed, be varied to make it an order for sale.

As regards the period for redemption, whatever period is customary in England, it seems clear that under O. 34 the court has discretion to fix such period as it chooses not exceeding six months. The learned judge exercised this discretion by fixing a period of three months from the date of confirmation of the account. I would not interfere with the exercise of the learned judge's discretion and would leave the period for redemption as ordered by him.

In lieu of the learned judge's order there should therefore, in my opinion, be an order for sale in terms of O. 34, r. 4, the period for redemption under r. 2 (c) as applied by r. 4 being three months from the declaration of the amount due under the account.

I come now to the question of the personal liability of the respondent. This depends entirely on the construction to be placed on the terms of the two memoranda of deposit. Mr. Lockhart Smith at first argued in the alternative that, as in the case of an ordinary mortgage, personal liability for the debt ought to be implied even if not expressly provided for in the memoranda of deposit; but he subsequently abandoned this argument, I think rightly, in view of the dicta of Luxmoore, J., in *Re Conley* (1), [1938] 2 All E.R. 127. In that case the Court of Appeal in England was considering, *inter alia*, the question of the personal liability of a person who had deposited collateral security with a bank in respect of the debt of a third party—in fact, the very question which arises in this case. The relevant passage in the judgment of Luxmoore, J., (at p. 134 of the report) is as follows:

“So far as the first point is concerned, the respective contracts between the depositors and the banks are in each case regulated by a written document. In none of these documents is there any express provision that the depositor is to be under any personal liability, and I am unable to appreciate on what ground it can properly be said that personal liability is to be implied, and what is to be its limit.”

Mr. Lockhart Smith also founded an argument on s. 62 and s. 64 of the Land Registration Ordinance (Cap. 334). Section 62 provides for certain covenants, including a personal covenant to pay the principal money, to be implied in every registered mortgage. Mr. Lockhart Smith argued at first that since the bank had registered its lien under the first memorandum of deposit in accordance with s. 64, this was a registered mortgage and the covenants set out in s. 62 must be implied. He subsequently conceded, however, that this argument was not tenable in view of s. 41 of the Ordinance, which makes clear what is meant by the term “registered” mortgage; but he argued that under the memorandum the bank was entitled to have executed by the respondent “a valid legal mortgage with all proper provisions”, and “all proper provisions” included the implied covenants in s. 62; and that accordingly the equitable mortgage must be subject to the same implied covenants. In my view the answer to this is that under s. 43 of the Ordinance any covenant implied by virtue of the Ordinance may be negated by express provision, and therefore the covenants under s. 62 are not absolute covenants; that “all proper provisions” must mean all proper provisions to give effect to the liability of the respondent under the memorandum; and that if, upon a true construction of the memorandum, the respondent is under no personal liability, he would be entitled to have inserted in the legal mortgage a clause negating the implied covenant involving personal liability.

I turn to the question of the construction of the memoranda themselves. The learned judge held that there was nothing in the memoranda to impose personal liability for the principal moneys on the respondent. In considering the question he set out the first memorandum in full, but dismissed the second memorandum with the words:

“The other memorandum was similar and was in consideration of further advances of Shs. 20,000/- to H. Ghauri & Company.”

So far as the first memorandum is concerned I can see no reason to differ from the learned judge. There is no need to set out the terms of the memorandum in full in this judgment. It is sufficient to say, in the words of Luxmoore, J., in *Re Conley* (1), that there is no express provision that the respondent is to be under any personal liability. As regards the second memorandum Mr. Lockhart Smith relied strongly on the words “payable by me” in the following passage:

“... and I having agreed to give additional security to secure the same

I now deposit with you herewith the documents of title mentioned below to the intent that the properties to which they relate may be a further as well as a continuing security for the payment to you on demand of all moneys secured under the principal memorandum now due and also with payment on demand of all moneys now due or hereafter to become payable by me under this supplementary memorandum of deposit”.

And he argued that the two memoranda must be read together and that by reason of these words it should be held that the respondent is under a personal liability under both memoranda.

To deal with the last part of the argument first, I can see no substance in it. The words “payable by me”, if they have the meaning contended for by Mr. Lockhart Smith, are in my opinion, clearly referable to the Shs. 20,000/- secured under the second memorandum only, and not to the Shs. 400,000/- secured under the first memorandum.

However, I do not think the words “payable by me” place the respondent under any personal liability even in respect of the second memorandum. The corresponding words in the first memorandum are:

“... I deposit with you herewith the document of title mentioned below to the intent that the property to which it relates may be a continuing security for payment to you on demand of any banking facilities and accommodation granted to the said H. Ghauri & Company Limited.”

It will be noted that the words “payable by me” do not appear. I am inclined to think, though I cannot assume, that the words “payable by me” were copied into the second memorandum by inadvertance when the memorandum was being drafted by reference to some form of precedent. Apart from this single phrase the memorandum, when read as a whole, is, in my opinion, clearly not intended to impose any personal liability on the respondent; and I see no compelling reason to read such a meaning into the words “payable by me under this supplemental memorandum of deposit”. Those words can be read as being referable and confined to the liability of the respondent to the extent of the properties put forward as security for the additional facilities to be granted by the bank, and, in my opinion, in view of the obvious intention of the memorandum when read as a whole, should be so construed.

I would therefore hold that the respondent is under no personal liability for the debts of the company under either memorandum.

In the result I think the appeal should be dismissed except that the order of the learned judge should be varied as indicated earlier in this judgment. As regards costs, the bank has succeeded as to a part of the appeal. It is true that the point was conceded by Mr. Thornton for the respondent, but this was not done till after Mr. Lockhart Smith had addressed the court. On the whole I think the bank should pay half the respondent’s costs of the appeal.

Gould JA: I agree and have nothing to add.

Sir Owen Corrie Ag JA: I also agree.

Appeal dismissed. Order of the High Court varied.

For the appellants:

WJ Lockhart Smith and AJ Kanji

For the respondent:

RS Thornton

For the appellant:

Advocates: *Satchu & Satchu*, Dar-es-Salaam

For the respondent:

Fraser Murray, Thornton & Co, Dar-es-Salaam

Margaret TE Colbeck v Noel L Colbeck
[1961] 1 EA 431 (SCK)

Division: HM Supreme Court of Kenya at Nakuru

Date of judgment: 10 July 1961

Case Number: 2/1961

Before: Goudie Ag J

[1] Divorce – Collusion – Answer filed by respondent – Instructions later given to respondent’s advocate not to defend – Answer not withdrawn – Petitioner required to prove allegations in petition – Whether collusion to be inferred.

[2] Divorce – Condonation – Petitioner alleging cruelty – Petitioner’s decision to petition before cohabitation ceased – Intercourse once after decision made – Whether evidence proves condonation.

Editor’s Summary

The parties were married in 1950. In 1961 the wife petitioned the dissolution of the marriage on the ground that the respondent had been persistently cruel to her physically and mentally. After the respondent had filed an answer to the petition denying the cruelty and pleading condonation he instructed his advocate not to defend the cause on the ground that he did not wish his wife to be subjected to cross-examination, but his advocate informed the court at the hearing that the answer was not withdrawn. The evidence of the wife on the issue of condonation was that in December 1960, when she was packing to take her child and the children of two friends to the coast with the respondent for a holiday, her husband came home somewhat drunk and proceeded to criticise her packing and the food, and being tired, she lost her temper and threw a cup of tea at him, whereupon he retaliated by striking her on the head with a heavy milk jug which cut her badly. Having then determined to leave her husband the petitioner nevertheless went to the coast for the sake of the children concerned but upon her return she waited until her child had returned to school and then left the matrimonial home. She admitted that on Christmas Eve there was one act of intercourse and explained that the delay in leaving her husband was due to her consideration for the children who were looking forward to their visit to the coast.

Held –

- (i) there was no evidence to suggest collusion and the husband’s insistence on his wife proving her allegations of cruelty was not consistent with collusion.
- (ii) there was ample evidence of cruelty.

- (iii) the decision of the petitioner to go with the respondent and the children to the coast for the sake of the latter was a reasonable and praise-worthy explanation and there was no reason to disbelieve that despite the decision that she intended to leave her husband at the first available opportunity.
- (iv) it is a question for determination by the court in each case whether the conclusion is to be drawn from the circumstances that an act of intercourse constitutes forgiveness and re-instatement; in the instant case there was no reason to disbelieve the petitioner that she and the respondent were still quarrelling and that she never changed her firm intention to leave the respondent as soon as circumstances permitted; accordingly there had been no re-instatement and the petitioner had not condoned the respondent's cruelty.

Decree nisi granted.

Cases referred to:

- (1) *Bertram v. Bertram*, [1947] P. 59
- (2) *Emanuel v. Emanuel*, [1946] P. 115; [1945] 2 All E.R. 494.
- (3) *Germany v. Germany*, [1938] 3 All E.R. 64.

- (4) *Keats v. Keats and Montezuma* (1859), 1 Sw. & Tr. 334; 164 E.R. 754; 27 Digest (Repl.) 395, 3260.
- (5) *Henderson v. Henderson*, [1944] 1 All E.R. 44; [1944] A.C. 49.
- (6) *Morley v. Morley*, [1961] 1 All E.R. 428.

Judgment

Goudie Ag J: This is a wife's petition for divorce on the grounds of cruelty. The petition was filed on March 9, 1961.

On April 10, 1961 the husband respondent filed an answer to the petition denying the cruelty alleged and contending that if cruelty were proved against him there was condonation on the part of the wife.

The cause was set down for hearing as a defended cause but on the day fixed for the hearing the husband's advocate informed the court that he had instructions not to defend the cause. The ostensible reason for the husband taking this course is contained in a letter to the wife dated June 25, 1961 (exhibit 5) wherein he says in effect that he could not bear to hear his wife subjected to very heavy cross-examination as to their married life and that he would

"have to bring to light certain intimate facts which should only belong to you and me".

Whilst withdrawing from the defence of the cause the husband's advocate made it very clear that the husband's answer was in no way to be regarded as being withdrawn, in other words that the husband still denied the cruelty and maintained the allegation of the wife's condonation, and that the husband's withdrawal from the active defence of the cause was in no way as the result of collusion between the parties or their advocates.

The first issue that arises is whether or not there was collusion causing the husband to alter his attitude with regard to the active defence of the cause. Apart from the fact that if there had been collusion one would expect the answer itself to be withdrawn and not expect the husband to insist on the wife proving strictly her allegations of cruelty I am fully satisfied that there is no evidence whatever to suggest any possibility of collusion.

As regards the allegations of cruelty I state at the outset that I have no doubts whatsoever that the wife was a witness of truth. She gave her evidence composedly and well with a transparent honesty and desire for complete accuracy which caused her frequently to give to her own counsel answers which he clearly did not either expect or desire to questions which if they were not strictly leading at any rate clearly indicated the type of answer which was expected. I regarded the wife as a very clear, careful, and honest witness. On her evidence, corroborated as it was in a material particular by the evidence of Brigadier Baines (P.W. 2), I have no hesitation whatsoever in finding that the husband was guilty of persistent cruelty to his wife which took the form both of physical cruelty and of mental cruelty causing physical illness by his excessive drinking and by his general unkind and inconsiderate attitude towards her and, on occasions, his deliberate humiliation of her before strangers and subordinates. To the extent that individual or general or acts of cruelty are denied by the husband or differently explained by the husband in his answer then I prefer and accept the wife's evidence and her version of the incidents and of their married life together generally. I find cruelty established on what I regard as very clear evidence from a truthful witness, partially corroborated, and I do not find it necessary to say anything further on the issue of cruelty.

The issue of condonation is, however, a very much more difficult and complex matter and to explain my decision in this matter I shall have to consider the evidence in a certain amount of detail to show what I believe to be the established

facts before applying the law, as I understand it to be, to those facts. In establishing the facts I reiterate that I accept the facts as being in accordance with the wife's evidence when her evidence appears to be in conflict with the husband's answer.

The marriage in July, 1950, was one of more or less incessant quarrels from the outset. I do not need to enter into details on this aspect but as I have said there was persistent and, I find, serious cruelty on the part of the husband more or less throughout the marriage. The grave nature of some of the assaults and the pointing on at least two occasions of a pistol at the wife and the placing by the husband of his hands round the wife's neck as though to strangle her with the result that she nearly lost consciousness leave me in no doubt whatsoever that the wife was in considerable fear of her husband.

Although as I have said the husband was guilty of grave and persistent cruelty towards his wife more or less throughout their married life, the wife, for whatever reason, continued to live with him in the fullest sense and I think there can be no doubt, and I so find, that all acts of cruelty individual and cumulative until December 16, 1960, were condoned by the wife by her continuing to co-habit with her husband despite all that she had to bear from him.

I now come to the incident of December 16, 1960, on which I find the facts to be as follows:

On that day the wife was busy packing up the things for the family consisting of herself, her husband and their young child as they were all going to the coast next day for a holiday taking the children of two other friends with them. The wife said she was tired, which is understandable, and I think it probable that she may well have felt a little harassed and in need of a little kindness and consideration. Between 8 and 9 p.m. the husband who had been out drinking came home as the wife put it "not very drunk but argumentative and in an odd mood". He then proceeded to criticise everything she had been doing, including the food and the packing. Considering that the husband had been out enjoying himself and in view of the prior history of cruelty I have no doubts whatsoever that from the wife's point of view this was the "last straw". She admits she was angry and I have no doubt that she lost her temper and she threw the contents of the cup of tea which she was drinking at her husband. She says that it had been poured out for some time and denies that it was "scalding hot" as her husband alleges in his answer and I believe her. I do so both because she impressed me as an extremely truthful and careful witness and because the husband's statement that the injury that he then caused his wife was not serious and did not bleed profusely is palpably untrue having regard to the evidence of Dr. Craddock (P.W. 3). To resume, however, after his wife had thrown the tea at him, the husband immediately picked up a large and fairly heavy milk jug in both hands and brought it down according to the wife "with full force" on her head still holding it as he did so. The wife as she says "went out" but she vaguely remembers her husband throwing the jug at the wall and it smashing to smithereens. When the wife "came to" she was bleeding profusely from the head and her husband then rendered a certain amount of "first-aid" not, according to the wife, in a particularly gentle or contrite manner. The wife then told her husband that she was definitely going to leave him. She did not do so, however, but proceeded to go on holiday next day as arranged with her husband, her own child and the other children whom they were taking with them. The parties returned from the coast on January 7, 1961. On January 23, 1961, their child returned to school and on January 24, 1961, the wife finally broke with her husband and left the matrimonial home. The wife admits that whilst at the coast she permitted her husband to have sexual intercourse with her on one occasion but I accept her evidence that although her husband asked her to have intercourse with him on two other occasions at the coast she refused him. I also accept her evidence that this was the sole act of intercourse

between them since the jug incident when she told her husband that she intended to leave him.

It is necessary to consider first the effect of the jug incident of December 16, 1960. There can be no doubt that the wife was in the wrong in throwing the tea at her husband. It was a provocative act hurtful to a man's pride. At the same time it was in my view committed under quite strong provocation. Certainly, although it might have excused a minor assault, the retaliation by the husband was, in my view, out of all reasonable proportion to the provocation offered. In all the circumstances I think the retaliatory act coupled with the refusal to permit her to see a doctor and the unkind manner of the "treatment" he offered and the lack of any sign of regret justify me in regarding this retaliatory act on the husband's part as an act of cruelty in itself. Be that as it may, however, I accept the wife's evidence that even at the coast her husband continued to swear at her in the bedroom and in "asides" and that in private "things were as bad as ever". It is well settled law that acts which would not in themselves necessarily be sufficient to obtain relief may yet be sufficient to revive a condoned offence and acts of great unkindness will revive condoned cruelty. *Bertram v. Bertram* (1), [1947] P. 59. I find that both the jug incident and also the swearing at the wife and general unkindness of the husband during their stay at the coast were sufficient to revive the earlier condoned cruelty. It is quite clear therefore that had the wife left her husband very shortly after the resumption of cruelty at the coast she would have been entitled to a decree. It is necessary, however, to consider the effect of her delay in leaving him. In normal circumstances such delay might well be fatal to a decree since there would be a strong presumption of condonation. I do not, however, consider that there is any such presumption, or indeed any evidence of condonation, from this factor in the instant case since I am satisfied that the wife left at the first reasonably available opportunity in all the circumstances. I accept her evidence that she went on the coast holiday and "saw it through" purely for the benefit of her own and the other children. There is evidence that her own child was very upset at the prospect of the holiday being cancelled and I think this change of mind for the sake of the children coupled with the wife's decision not to let down the other children who were to accompany them is a reasonable, and indeed praiseworthy, explanation for her proceeding on the coast holiday despite everything that had occurred. I see no reason to disbelieve the petitioner when she says that she still intended to leave her husband at the first available opportunity on their return. Unfortunately, by the time they returned to the matrimonial home their child had contracted impetigo and she could not be taken anywhere for fear of infection. Eventually, however, on January 23, 1961, the child was able to return to school and on the very next day the petitioner left her husband. I accept the petitioner's statement,

"That was the first real opportunity I had for breaking away from co-habitation".

I do not therefore consider that in itself the delay amounts to evidence of condonation.

It remains to consider the effect of the wife having permitted the husband to have sexual intercourse on one occasion. The onus lies on the petitioner to satisfy me that the balance of probabilities favours the view that there was no condonation—*Emanuel v. Emanuel* (2), [1946] P. 115. I confess that this is the aspect of this case which has caused me most difficulty. In the earlier English cases the courts, with some exceptions, appear to have leant towards the view that unless there were very exceptional circumstances a petitioner wife permitting intercourse by her husband was to be regarded as having condoned the matrimonial offence, particularly when the wife had gone off with the husband after the commission of the matrimonial offence (see *Germany v. Germany* (3),

[1938] 3 All E.R. 64). As I have said, however, in the instant case there was a very good reason, quite unconnected with forgiveness of the husband, for the wife going away with her husband to the coast. There is, moreover, no actual presumption as such from the permitting of intercourse by the wife that she has necessarily condoned the matrimonial offence, *Germany v. Germany* (3). It is a question of fact in each case as to what conclusion is to be drawn from the whole of the surrounding circumstances including the fact of intercourse. Was there a:

“blotting out of the offence imputed so as to restore the offending party to the same position he or she occupied before the offence was committed”.

Keats v. Keats and Montezuma (4) (1859), 1 Sw. & Tr. 334; 164 E.R. 754; 27 Digest (Repl.) 395 per Sir Creswell Creswell). There must be “forgiveness and reinstatement”. *Henderson v. Henderson and Crellin* (5), [1944] A.C. 49.

In the present case there is no evidence to indicate forgiveness other than the one isolated act of intercourse and this is the only evidence of “reinstatement”. I see no reason to disbelieve the wife when she says that she and her husband were still quarrelling over this period, that her husband made the suggestion and that she objected but that eventually after persistence on his part she gave in: . . .

“I agreed to intercourse as I thought it might help to calm us both down and our relationship would become less strained. I would *not* say it was a sort of reconciliation. There was no sort of “forgive and forget” about it . . . I never after the jug incident changed my firm intention to leave my husband as soon as circumstances permitted.”

Moreover, I regard it as significant that although the husband in his answer deals quite fully with the allegations of cruelty and, as I find, has invented two additional acts of intercourse which did not occur, and has suggested again as I find untruly, that it was his wife who was making the advances there is not a single suggestion of any words of forgiveness or suggestion that his wife promised or implied that she would “take him back”. It is extremely difficult for any court, perhaps it is difficult even for the wife herself, to detail exhaustively every single factor which may have influenced her to permit an act of intercourse. It is known that the wife is a woman of strong religious feelings, although her husband cruelly taunted her on this account, and it may not be without some significance that this act of intercourse took place only after considerable persistence on Christmas Eve. It may also have some significance as I mentioned much earlier that the wife was in some fear of her husband. However, she has not advanced these reasons and this must, therefore, be conjecture. Of one thing I am, however, entirely satisfied after careful consideration of all the circumstances, and that is that whatever else the consent betokened it did not arise out of a desire to demonstrate either forgiveness or reinstatement. There may have been a lingering forlorn hope that despite everything that had gone before it might induce her husband to “mend his ways”, and to that extent it might be regarded as possibly showing a desire for a reconciliation, but voluntarily having sexual intercourse with a husband in an attempt to effect a reconciliation does not necessarily constitute a reinstatement by the wife of the husband in his former marital position. *Morley v. Morley* (6), [1961] 1 All E.R. 428.

I am satisfied as to the Court’s jurisdiction on the grounds of both residence and domicile. I am further satisfied and find that the petitioner is not in a state of desertion as the husband alleges.

The petitioner is granted her decree nisi for cruelty. Decree absolute to be

applied for not earlier than three months from today. The respondent will pay the costs of the cause.

The question of custody and access to the child of the marriage and the question of maintenance is adjourned into Chambers and may be mentioned not earlier than seven days from today to enable counsel to attempt to reach agreement in the meantime.

Decree nisi granted.

For the petitioner:

CS Rawlins

For the respondent:

BRP Todd

For the petitioner:

Advocates: *Geoffrey White & Co*, Nakuru

For the respondent:

BRP Todd, Nakuru

Cowasjee Dinshaw & Bros (Aden) Ltd v Cowasjee's Staff Association [1961] 1 EA 436 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 July 1961
Case Number:	35/1961
Before:	Sir Trevor Gould, Crawshaw and Newbold JJA
Appeal from:	H.M. Supreme Court of Aden–Le Gallais, C.J

[1] *Appeal – Jurisdiction of court – Appeal from court to which appeal lies by statute – Right of appeal – The Industrial Relations (Conciliation and Arbitration) Ordinance, 1960, s. 2, s. 5, s. 16, s. 17, s. 19, s. 20, s. 21, s. 22, s. 23 (A.) – Industrial Court Rules, 1960, r. 12 (A.) – Appeals to the Court of Appeal Ordinance (Cap. 7), s. 6 (A.).*

[2] *Master and servant – Trade dispute – Award of industrial tribunal – Reasons for award not given – Errors of law alleged – Whether tribunal must give reasons for award – The Industrial Relations (Conciliation and Arbitration) Ordinance, 1960 (A.).*

[3] *Master and servant – Trade dispute – Award of industrial tribunal – Tribunal constituted by statute – Award made operative from date prior to statute coming into force – Award failing to comply with mandatory provisions of statute – Whether award bad in law – The Industrial Relations (Conciliation and Arbitration) Ordinance, 1960, s. 17 (A.) – Industrial Court Rules, 1960, r. 12 (A.).*

Editor's Summary

By s. 5 of the Industrial Relations (Conciliation and Arbitration) Ordinance, 1960, an industrial court was established for the settlement of trade disputes. By s. 16 of the Ordinance the court is required to hear the parties and any relevant evidence and then make such award "as appears to it to be just". By s. 19 an appeal lies against an award to the Supreme Court of Aden upon a point of law but otherwise, subject to s. 20, which provides for applications to the industrial court to vary or set aside the terms of an award, an award of that court is for all purposes final and conclusive. Upon the hearing of an appeal from the Supreme Court it was submitted that no further appeal lay on the grounds that the purpose of the Ordinance was the expeditious settlement of trade disputes and it could not have been the intention of the legislature to allow appeals from the Supreme Court with the delay and frustration involved; further that in determining whether an appeal lay the Ordinance must be considered as a whole.

Held –

- (i) by s. 6 of the Appeals to the Court of Appeal Ordinance an appeal lies as of right in civil cases (subject to certain conditions which did not arise) from any final judgment (which includes orders) of the Supreme Court of Aden.
- (ii) whilst there are two divergent streams of authority on the question whether, where a decision of an extra-judicial authority is made appealable to an established court but no further right of appeal is given, this imports any general right of appeal from the established court, the test applicable is whether the established court is exercising a special jurisdiction. *Sheikh Noordin Gulmohamed v. Sheikh Bros., Ltd.* (1951), 18 E.A.C.A. 42, applied.
- (iii) since the right of appeal to the Supreme Court of Aden is specifically limited to points of law, this imports the ordinary jurisdiction of that court in a matter which by the municipal law of Aden is specifically appealable to the Court of Appeal.

Conciliation proceedings having failed, a dispute between the appellant company, which was incorporated in 1955, and its staff association, the respondent, was referred to the industrial court established by the Industrial Relations (Conciliation and Arbitration) Ordinance, 1960. The award of the court made after hearing the parties and evidence did not set out the reasons leading to the determination nor did it specify the period for which it was to continue in force as required by s. 17 (1) of the Ordinance, but made the award retrospective to a date prior to the date on which the Ordinance came into force. The appellant company appealed to the Supreme Court against the award claiming that it was bad in law for a number of reasons. This appeal was dismissed whereupon the appellant company brought this further appeal specifically limited to that part of the award which dealt with gratuities for service prior to the date of incorporation of the company. The appellant company objected *inter alia* to the award taking into account the service of employees with a partnership bearing a name similar to that of the appellant company. It was not proved that the appellant company was a continuation of the partnership.

Held –

- (i) there is nothing in the Ordinance which requires the industrial court to set out its reasons for an award and failure to do so is not an error of law.
- (ii) having regard to the specific limitation of the appeal to that part of the award dealing with gratuities for service prior to the date of incorporation of the appellant company, the objection of the appellant company to the award was merely upon the quantum of its prospective liability to employees and it could not be said that the award was retrospective on that account. *Master Ladies Tailors' Organization v. The Minister of Labour and National Service*, [1950] 2 All E.R. 525, applied.
- (iii) since the industrial court is required to make such award as appears to it to be just and no reasons had been given for taking into account, in computing gratuities, the service of employees with the partnership before the incorporation of the appellant company, it must be assumed that the court had proceeded upon a wrong principle of law.
- (iv) section 17 (1) of the Ordinance is mandatory and requires the period for which an award is to continue in force to be specified in the award and failure of the court to do so invalidated the award.

Appeal allowed. Judgment and order of the Supreme Court set aside. Award declared invalid so far as it directs that gratuities shall be paid for service prior to the incorporation of the appellant company.

Cases referred to:

- (1) *Sheikh Noordin Gulmohamed v. Sheikh Bros., Ltd.* (1951), 18 E.A.C.A. 42.
- (2) *Hemns v. Wheeler*, [1948] 2 K.B. 61.

- (3) *Grimshaw v. Dunbar*, [1953] 1 All E.R. 350.
- (4) *Minister of National Revenue v. Wright's Canadian Ropes, Ltd.*, [1947] A.C. 109.
- (5) *C.R.H. Readymoney, Ltd., Bombay v. The State of Bombay*, 59 Bom. L.R. 786.
- (6) *Master Ladies Tailors' Organization v. Minister of Labour and National Service*, [1950] 2 All E.R. 525.
- (7) *Pioneer Laundry and Dry Cleaners, Ltd. v. Minister of National Revenue*, [1940] A.C. 127; [1939] 4 All E.R. 254.
- (8) *National Association of Local Government Officers v. Bolton Corporation*, [1943] A.C. 166; [1942] 2 All E.R. 425.

July 17. The following judgments were read:

Judgment

Newbold JA: This is an appeal from a judgment and order of the Supreme Court, Aden, dated December 14, 1960, dismissing with costs an appeal by the present appellant against an award made by the President of the Industrial Court established by s. 5 of the Industrial Relations (Conciliation and Arbitration) Ordinance, 1960.

The circumstances and nature of this appeal are unusual—indeed it is the first of its kind—and it is necessary to set out the circumstances in some detail.

The Industrial Relations (Conciliation and Arbitration) Ordinance, 1960 (No. 6 of 1960 of Aden) (hereinafter referred to as the “Ordinance”) came into operation on August 16, 1960, and the preamble reads as follows:

“An Ordinance to make provision for the prevention and settlement of trade disputes: for the establishment of an industrial court: and relating to matters arising out of or connected with trade disputes and the relations between employers and workmen.”

By s. 5 of the Ordinance there was established an industrial court:

“for the settlement of trade disputes in accordance with the provisions of this Ordinance”

consisting of a president, who had power to appoint assessors to assist him, though the question of any award and the terms thereof was a matter for the president alone. By s. 2 of the Ordinance the expressions “employer”, “trade dispute” and “workman” are defined as follows:

“ ‘employer’ includes any person who is an employer whether an individual person or a body corporate”;

“ ‘trade dispute’ means any dispute or difference between an employer or employers and workmen or between workmen and workmen which is connected with the employment or non-employment or the terms of the employment or with the conditions of labour of any person”;

“ ‘workman’ means any person who has entered into or works under a contract with an employer whether the contract be by way of manual labour, clerical work or otherwise, be expressed or implied, oral or in writing and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour.”

Provision is made for conciliation proceedings and it is provided that in the event of no settlement being

effected the matter shall be reported to the industrial court which may then require the parties to the dispute to attend

before it for the purpose of determining the dispute. By s. 16 of the Ordinance the industrial court shall hear the parties to the dispute and such evidence as is relevant for the determination and may then make such award “as appears to it to be just”. Section 17 and s. 19 of the Ordinance read as follows:

- “17. (1) An award shall be binding upon the parties to the dispute, whether or not such parties appeared or were represented at the hearing, and shall continue in force for a period to be specified in the award not exceeding two years from the date upon which the award comes into force.
- “(2) An award shall come into force upon such date, which may be retrospective, as the court may decide”.
- “19. An appeal against an award shall lie to the Supreme Court upon a point of law but otherwise an award shall subject to the provisions of s. 20 of this Ordinance be for all purposes final and conclusive.”

By s. 20 of the Ordinance provision is made for an application to the industrial court to vary or set aside the terms of an award with specific power to vary the terms for the purpose of removing ambiguity. By s. 21 of the Ordinance certain powers of the industrial court are set out, including the general power to do all such things as are necessary for the “just hearing and determination of the dispute”. By s. 22 and s. 23 of the Ordinance it is an offence if any person bound by the award fails to observe any condition of it and if any person during the currency of an award encourages or hinders any other person not to comply with it. In accordance with a power contained in the Ordinance the Chief Justice made the Industrial Court Rules, 1960, which were published on September 15, 1960, and by r. 12 it is provided that if any question arises as to the interpretation of an award an application may be made to the president of the industrial court for a ruling and that his ruling shall be final and conclusive.

The facts in this appeal are as follows:

The appellant is a limited liability company incorporated on May 4, 1955, and the respondent is a staff association, membership of which is open to all employees of the appellant whose salary exceeds a specified figure. A dispute arose between the appellant and the respondent and, conciliation proceedings having failed to achieve a settlement, the dispute was reported to the industrial court, the terms of reference being as follows:

“To determine differences between the parties as to:

- (a) the effective date for a salary increase of 10 per cent.;
- (b) inclusion in basic pay of food allowance of Shs. 180/- per month; and
- (c) payment of end of service gratuities and the period to be covered by such gratuities.”

The industrial court heard the parties and on October 20, 1960, the president made the following award:

“The president having given careful consideration to the evidence and submissions of the parties, finds and so awards as follows with immediate effect:

“The award shall apply to all employees of Cowasjee Dinshaw & Bros. (Aden) Limited who are members of the Cowasjee’s staff association or who are eligible for such membership, except that cl. 2 of the award shall apply only to the employees concerned.

- “1. A salary increase of 10 per cent, of the basic salaries in force on June 1, 1960, shall be paid with effect from that date.

- “2. The sum of one hundred and eighty shillings a month now being paid in cash to certain employees instead of the former food allowance in kind shall be incorporated in the basic salary of those employees with effect from October 1, 1960, and the combined figure shall be used from that date for the calculation of salary adjustments, leave pay, end of service gratuities and other appropriate purposes.
- “3. End of service gratuities shall be paid in respect of the total period of service with the company and with the previous partnership firm to all employees with not less than three years’ service.
- “The scale of gratuity shall be half a month’s salary for each year of service in the first fifteen years of service, three-quarters of a month’s salary for each year of service in the next fifteen years of service, and one month’s salary for each subsequent year of service.
- “For the purpose of calculating the amount of the gratuity the salary of each employee shall be his or her basic salary at September 30, 1960, for all service before that date. For service after that date the basic salary shall be the final salary of the employee, including the one hundred and eighty shillings incorporated in the basic salary as specified in cl. 2 above.”

The appellant, as stated above, was incorporated on May 4, 1955. For many years prior to that date a partnership was carried on under the name of Cowasjee Dinshaw & Bros. This partnership (hereinafter called “the old partnership”) was dissolved, with effect from December 31, 1954, under a decree of the High Court of Bombay. As from January 1, 1955, the business was carried on by a new partnership (hereinafter called “the new partnership”) consisting of one of the original partners and two others who had not previously been partners. This new partnership ceased on May 4, 1955, when the appellant was incorporated as a limited liability company. It is not clear whether the appellant is, in effect, a continuance in the form of a limited liability company of the new partnership, but it is clear that it is not in effect a continuance of the old partnership. The old partnership appears to have engaged its employees on contract for a specified period and at the end of the period (or any agreed extension of it) the employee left the service of the partnership. On the termination of the period of service the employee was in a number of cases repatriated to India at the cost of the old partnership and in some cases he also received, at the discretion of the old partnership, an ex gratia bonus. In many cases the employee signed a statement to the effect that the old partnership had fulfilled all its obligations to him. It was then open to the parties, if they so wished, to enter into a fresh contract of employment, and in a number of cases this was done after periods of absence which varied but in some cases exceeded a year. The period of absence was not treated as leave, either paid or unpaid, and it appears that there was no obligation on either side to renew the contract. It is also clear that there was no obligation on the old partnership to pay to any employee a gratuity based on service. It does not appear that any clear records were kept and the facts in respect of individual employees are gleaned partly from such records as the old partnership kept and are extant, and partly from the employees themselves. The conditions on which the new partnership continued, on January 1, 1955, the service of those employees who had been in the service of the old partnership are not clear, but no steps were taken to discharge and re-employ the employees and it seems to have been accepted by both the new partnership and the employees that the terms of service should continue as previously. No change appears to have been made in the conditions of service during the period of the new partnership from January 1, 1955, to May 4, 1955, when the appellant company was incorporated. Similarly the appellant took no steps to discharge and re-employ those employees who had been in the

service of the new partnership and it seems to have been accepted by the appellant and the employees that the terms of service should continue as previously. This being so, the appellant at the time that it took over the employees from the new partnership was under no liability to pay any gratuity based on service performed by the employees either for the old or the new partnership.

The award of the industrial court set out briefly, *inter alia*, the submissions of the respondent and the appellant and immediately thereafter set out the award (as set out above) without setting out the reasons which led the industrial court to make the award. From this award the appellant appealed to the Supreme Court of Aden against all those matters which were the subject of the award, claiming that the award was bad in law for a number of reasons. The learned Chief Justice of the Supreme Court dismissed the appeal, holding that there was no point of law upon which he would be justified in setting aside or varying the award and a formal order was accordingly extracted. From this judgment and order the appellant appealed to this court, but the memorandum of appeal specifically limited the appeal to that part of the award as dealt with gratuities for service prior to the date of the incorporation of the appellant. Mr. Nazareth, who appeared for the appellant, specifically stated that though his argument included submissions that the award was bad in law in its entirety, these submissions were addressed to the court purely in relation to the grounds of appeal which restricted the appeal to that part of the award which dealt with gratuities for services prior to the incorporation of the appellant; that he was not seeking that the award should be set aside in any other respect; and, indeed, that the appellant on practical grounds was accepting all the other provisions of the award.

Sir William Lindsay, who appeared for the respondent, stated that he had a preliminary point to take as to whether an appeal lay to this court. Since it was obviously desirable in the circumstances that the appeal should be finally disposed of as soon as possible (indeed Sir William asked that the decision be given as early as possible) and as delay might have resulted if we had heard the argument on the preliminary point before hearing the appeal on its merits, we decided to hear the appeal on the merits, the question of whether an appeal lay being raised by Sir William in his address and with him having a final right of reply on that point.

In these circumstances it would be convenient at this stage to deal with the question as to whether an appeal from the Supreme Court lies to this court.

Sir William submitted that, though an appeal lay under s. 19 of the Ordinance on a question of law to the Supreme Court, Aden, no further appeal lay; that the purpose of the Ordinance was to provide for the expeditious settlement of trade disputes and that it could not be the intention of the legislature to allow appeals from the Supreme Court, with the consequent delay and frustration of the purposes of the Ordinance; and that in determining whether an appeal lay the Ordinance must be looked at as a whole and that where so looked at it was clear that, subject to an appeal on a point of law only to the Supreme Court, Aden, the award was to be final and conclusive. In support of his submissions he referred to a number of authorities.

Section 6 of the Appeals to the Court of Appeal Ordinance (Cap. 7 of the Laws of Aden) provides that, subject to certain conditions which do not arise, an appeal shall lie in civil cases as of right from any final judgment (which by definition includes order) of the Supreme Court. Two divergent streams of authorities exist on the question of whether, where a decision of an extra-judicial authority which is specifically made appealable to an established court but no further right of appeal is given, this imports any general right of appeal from the decisions of the established court. The authorities were reviewed in *Sheikh Noordin Gulmohamed v. Sheikh Bros. Ltd.* (1) (1951), 18 E.A.C.A. 42,

and at p. 48 the learned Justice of Appeal, who delivered the leading judgment, said:

“Be that as it may, it must, in my opinion now be regarded as well settled that once a matter has arrived at an established court by way of appeal, the ordinary legislation dealing with further appeals from that court must be held to apply, unless excluded by special legislation, or unless the case can be brought within the principle laid down in the Rangoon group of authorities.”

In the present case the requirements which permit of an appeal to this court exist unless it falls within the principle of the Rangoon group of authorities. This principle, I think, can be stated thus: does the established court in hearing the appeal from the extra-judicial authority exercise a special jurisdiction? If it does, then no further appeal lies merely by reason of the fact that an appeal lies from its decisions in the exercise of its ordinary jurisdiction. The question, therefore, is: In this case was the Supreme Court, Aden, exercising a special jurisdiction in hearing the appeal upon points of law from the industrial court. It is true that the functions of the industrial court are functions of a special nature and in many respects are similar to arbitration proceedings. It is also true that in its proceedings the industrial court is not bound by the rules of evidence. If the right of appeal to the Supreme Court had been one which brought under review all aspects of the award of the industrial court, then it may well be that the Supreme Court was invested with a special jurisdiction. But the right of appeal to the Supreme Court is specifically limited to points of law, a matter within the peculiar purview of the ordinary jurisdiction of the law courts, and in my view this imports the ordinary jurisdiction of the Supreme Court in a matter which, by the municipal law of Aden, is specifically appealable to this court. As was pointed out by Mr. Nazareth, the existence of a further right of appeal does not of itself result in any delay in the implementation of the award—this would only arise if the Supreme Court in the exercise of its judicial discretion ordered a stay. For these reasons in my view an appeal lies to this court.

Turning now to the appeal on its merits, Mr. Nazareth submitted that the award was bad in law on the following grounds: First, that the award did not set out the reasons which lead to the determination and that this omission rendered the right of appeal nugatory; secondly, that the award was retrospective to a date prior to the commencement of the Ordinance; and thirdly, that the award failed to comply with the mandatory provisions of s. 17 (1) of the Ordinance, which required the period for which it was to continue in force to be specified in the award. As regards his second submission, Mr. Nazareth sought and obtained leave to amend his memorandum of appeal to include this ground. Mr. Nazareth submitted that if he succeeded on any of these points the award would ordinarily be bad in its entirety, but as he had specifically limited his appeal to the question of the gratuity and as his clients accepted the award on the remaining matters, any decision of this court on the invalidity of the award should be confined in its operation to gratuities for services prior to the incorporation of the appellant. Mr. Nazareth further submitted, in relation to the gratuities, that the award was bad in law for the following reasons: First that by the award the appellant was required to pay gratuities for service performed for an employer other than the appellant when no such liability existed when the appellant took over the employees from their previous employer; secondly, that the award required gratuities to be paid on total service as if it were continuous, whereas in fact it was a series of separate services under separate contracts and at the termination of each period of service all liabilities which then existed had been discharged, whether by payment of a bonus or otherwise; and thirdly, that the industrial court in making the

award failed to take into account the financial position of the appellant and its ability to pay. As regards this third submission, during the argument Mr. Nazareth sought leave to put in an affidavit which he stated set out only the evidence, particularly that relating to the financial position of the appellant, which had in fact been before the industrial court. Sir William objected to this and during the argument it transpired that para. 3 of the affidavit referred to a judgment which had been given subsequent to the date of the award. We decided to admit it *de bene esse* on the understanding that it contained only evidence which had in fact been before the industrial court, on which understanding the whole of para. 3 was to be struck out, and to decide in our final judgment whether it was admissible. To this course both counsel agreed. In my view, on the understanding that the affidavit contains only evidence which was in fact considered by the industrial court but which, because of the circumstances of the proceedings before the industrial court and of the absence of any normal record, is not otherwise before this court, I would admit the affidavit. Where an appeal court is charged with the duty of determining whether or not a decision of a tribunal is bad in law, where the submission is that such a determination depends on the evidence placed before the tribunal and where there is no record of the nature of that evidence, then in my view it is open to the parties to place before the appeal court by affidavit the nature of the evidence.

On the broad point of what is included within a question of law, Mr. Nazareth submitted that whether a court had any evidence before it to support its findings of fact and whether the inferences it had drawn were possible inferences from the facts found were questions of law; also, that even if the court had given no reasons for its decision, the appellate court could look at all the facts and if, having done so, the decision involved a serious miscarriage of justice, this imports that the court had proceeded on a wrong principle which, in turn, amounts to an error of law. In support of these submissions he referred to a number of authorities, including *Hemms v. Wheeler* (2), [1948] 2 K.B. 61; and *Grimshaw v. Dunbar* (3), [1953] 1 All E.R. 350. Sir William, if I understood his argument correctly, did not dispute these broad submissions of Mr. Nazareth, but submitted they were not applicable in this case. As broad propositions of what are included within questions of law I would agree with the submissions of Mr. Nazareth, but as was said by the Privy Council in *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* (4), [1947] A.C. 109 at p. 122:

“It is for the taxpayer to show that there is ground for interference, and if he fails to do so the decision of the minister must stand. Moreover, unless it be shown that the minister has acted in contravention of some principle of law the court, in their lordships’ opinion, cannot interfere: the section makes the minister the sole judge of the fact of reasonableness or normalcy and the court is not at liberty to substitute its own opinion for his”.

Turning now to the first submission, which was that there was an error of law because the industrial court had not given reasons for its award, I see nothing in the Ordinance which requires the industrial court to set out its reasons for the award. It is true that there is a right of appeal on a point of law and it is also true that if reasons had been given this would be of assistance on any appeal, but the failure to give such reasons is not an error of law nor does it render the appeal nugatory. The Privy Council in *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* (4), said at p. 123 the following:

“Their lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking

action under s. 6, sub-s. 2. But this does not necessarily mean that the Minister by keeping silence can defeat the taxpayer's appeal. To hold otherwise would mean that the Minister could in every case, or, at least, the great majority of cases, render the right of appeal given by the statute completely nugatory. The court is, in their lordships' opinion, always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one. If, on the other hand, there is in the facts shown to have been before the Minister sufficient material to support his determination the court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion. As has already been said, the Minister is by the sub-section made the sole judge of the fact of reasonableness and normalcy, but, as in the case of any other judge of fact, there must be material sufficient in law to support his decision."

It seems that those words are peculiarly apposite to this case and in my view it is not essential that the industrial court should set out its reasons for an award, nor is the failure to do so an error of law. In this respect I agree with the judgment of the learned Chief Justice.

Mr. Nazareth referred to certain Indian authorities, including *C. R. H. Readymoney Ltd., Bombay v. The State of Bombay* (5), 59 Bom. L.R., 786, where it is stated:

"... where a power is conferred upon an authority to do an act which concerns the fundamental rights of a subject and an appeal is provided against the decision of such authority although on the face of the statute the power conferred on the authority may appear to suggest that the authority had uncontrolled and arbitrary power, the authority is bound to act on reasonable grounds and to give its reasons for coming to its decision".

While I appreciate the persuasive force of these cases, nevertheless the opinions expressed were in relation to the fundamental rights of a citizen under the constitution of India, and I do not consider that they are applicable in this case.

As regards Mr. Nazareth's second submission, which was that the award was bad in law as it was retrospective to a date prior to the commencement of the Ordinance, it is to be borne in mind that the appeal relates only to that part of the award concerning gratuities. It is not suggested that the effect of the award is to enable an employee who finally left the service of the appellant before the date of the award, that is October 20, 1960, to obtain a gratuity; the complaint is that employees who retire subsequent to the date of the award become entitled to gratuities which are computed by taking into account a period of service prior to the commencement of the Ordinance. This, in my view, merely affects the quantum of a prospective liability of the appellant and it cannot be said that the award is retrospective; see *Master Ladies Tailors' Organization v. Minister of Labour and National Service* (6), [1950] 2 All E.R. 525.

As regards Mr. Nazareth's third submission, which was that the award was bad in law as the industrial court had failed to specify the period for which it was to continue in force as required by s. 17 (1) of the Ordinance, Mr. Nazareth submitted that the provisions of this section are mandatory and that a failure to comply with them vitiated the award, though as pointed out above, he limited his submission to the question of gratuities only. Sir William, if I understood him correctly, agreed that the section was mandatory unless it could be construed as meaning that the award should continue in force for two years unless the industrial court specified a shorter period. It is clear that if the

section is mandatory in its requirement, the period for which the award is to continue in force is to be specified in the award and the failure to specify such period invalidates the award. Can the section be construed in the manner submitted by Sir William and, if not, are its requirements mandatory? The construction urged by Sir William in my view does violence to the clear words of the section which require a period, not exceeding two years, to be specified in the award. The legislature in enacting that the industrial court should direct its mind specifically to the period for which the award is to remain in force, during which period it is binding on the parties, must have had regard to the nature of the matters which form the subject of the award. One of the main subjects of an award would normally be, as indeed it was in this case, a determination of the basic wage and the date from which it should apply. Such matters are dependent upon a large number of variables which cannot be foreseen with any certainty in the future. To fix such matters with justice both to the employer and employee necessitates that the industrial court should relate its award to a period in which it contemplates that the conditions on which it bases its award are likely to continue. This period may be short, though too short a period might have an unsettling effect on the industry, or it may be longer; the nature of a subject dealt with in the award might well permit of a longer period to be specified in the award than if another subject had been dealt with. These factors in my view make it imperative that the industrial court should specify clearly the period for which the award is to be binding on the parties and the legislature has laid down that the limit of any such period shall be two years. During the currency of the award it is specifically made an offence for any person bound by it to commit any breach of it; it is also an offence for any person during the currency of an award to advise a person bound by it not to comply with it. All these considerations lead me inevitably to the conclusion that the section demands that the industrial court specify in the award the period for which it is to continue in force (subject, of course, to the limit) and that a failure to do so invalidates the award. Having regard, however, to the specific restriction contained in the memorandum of appeal and to the specific statement made by Mr. Nazareth that his clients sought only to have the award declared invalid in respect of such part of it as required service prior to the incorporation of the appellant to be taken into account in computing gratuities, I would limit the invalidity of the award for the purposes of this appeal accordingly and treat the remainder of it as accepted by the party challenging it. I appreciate that such a course is unusual in respect of an award which fails to comply with the requirements of the law, but I think it is justified in all the circumstances of this appeal. Such a course, however, may well leave the position of the other matters dealt with in the award in doubt and it is for consideration whether it would not be desirable for the industrial court itself or either of the parties to take any steps necessary to amend or vary the award so as to specify the period during which the award in respect of the matters not challenged is to continue in force. It is only fair to the learned Chief Justice of the Supreme Court of Aden to point out that this ground of appeal was raised for the first time in this court.

As regards the submission that the award was bad in law in relation to gratuities as it imposed on the appellant a liability to pay gratuities in respect of service under another employer where no liability to pay gratuities existed at the time the employees were taken on by the appellant, it is clear, as stated previously, that neither the new partnership nor the appellant was in effect the same employer as the old partnership. There is no evidence as to whether the appellant is in effect the same employer as the new partnership, but it is clear that in law the appellant is a separate legal entity from both the old and the new partnership. In the circumstances in which the appellant continued the service of the employees who were taken over from the new partnership

it must, I think, be assumed that it was an implied term of the contract of employment that the service of the employees continued on the same terms as previously, and that in the absence of specific agreement the appellant undertook no liability which was not then in existence. At the time of the incorporation of the appellant no liability existed for the payment of any gratuities. The question, then, is whether an award of an industrial court can impose on an employer a liability to pay gratuities to its employees in respect of service under another employer. This, in my view, is a question of law.

Mr. Nazareth submitted that it was an error of law for the award to ignore the separate existence of the former employer, and referred to the following passage at p. 137 in the judgment of the Privy Council in *Pioneer Laundry and Dry Cleaners Ltd. v. Minister of National Revenue* (7), [1940] A.C. 127:

“Their lordships agree with the Chief Justice and Davis, J., that the reason given for the decision was not a proper ground for the exercise of the Minister’s discretion, and that he was not entitled, in the absence of fraud or improper conduct, to disregard the separate legal existence of the appellant company and to inquire as to who its shareholders were and its relation to its predecessors. The taxpayer is the company, and not its shareholders. Their lordships agree with the reasons given by these learned judges, and their application of the authorities cited by them, and it is unnecessary to repeat them.”

The industrial court is required to make such award as appears to it to be just. As was pointed out by Sir William, the determination of what is just is a matter solely for the industrial court and is not subject to review by this court unless it appears that the award has been based on incorrect principles of law. At first sight it would appear to be manifestly unjust to burden one employer with liabilities relating to a previous employment under another employer when such liabilities did not then exist. No reasons have been given by the industrial court as to why it imposed that burden on the appellant and I can only assume that the industrial court proceeded upon a wrong principle of law in failing to take note of the separate legal existence of the appellant and the previous partnership. This, in my view, invalidated the award in so far as it requires account to be taken of service prior to the incorporation of the appellant in computing any gratuities payable to employees. The learned Chief Justice does not appear to have considered this aspect of the matter as he states in his judgment that the award “provides for calculation on the total period of service with the appellant”. This is incorrect unless the learned Chief Justice has also disregarded the separate legal existence of the previous employer. Further, the powers and jurisdiction of the industrial court are limited to the settlement of trade disputes. A trade dispute is defined as a dispute or difference between an employer and workmen which is connected with the employment or the terms of employment of any person. In one sense a dispute between an employer and his workmen as to whether the terms of the employment with the employer should include benefits related to a previous employment under a prior and different employer can be said to be a dispute in relation to the terms of employment with the present employer. Under very special circumstances, it was held in *National Association of Local Government Officers v. Bolton Corporation* (8), [1943] A.C. 166, that a dispute between employer and employee as to payments to be made by the employer to the employees after they had ceased their employment in order to undertake war service was a dispute connected with the terms of their employment. Had the appellant specifically undertaken to treat service with the old and new partnerships in all respects as if it were service with the appellant, then a dispute as to whether benefits should be granted in respect of such previous service might well be a trade dispute. There is nothing in the award which suggests that the

industrial court found such to be the position. There is some reference in the submissions to a statement made on behalf of the appellant in relation to the previous service and to a denial that any such statement was made. In the absence of any specific finding on this point I see no reason to assume that any such specific undertaking was given by or on behalf of the appellant. I have grave doubts as to whether, in the circumstances of this case, the claim that the gratuity to be paid by the appellant be computed with reference to a previous employment under a different employer can be said to be a trade dispute within the meaning of the Ordinance and, consequently, whether the award upholding the claim was a valid one within the jurisdiction of the industrial court, but I find it unnecessary to decide this point having regard to my views on the other issues raised. In this connection doubt also exists as to whether the reference in the award to:

“the total period of service with the company and with the previous partnership firm”

refers only to the new partnership or to both the new and the old partnership. Submissions have been addressed to this court as to the meaning of the phrase “the previous partnership firm”. No attempt was made by either party to apply to the industrial court for an interpretation of the award and, under the Industrial Court Rules, 1960, any question of the interpretation of the award is a matter for the president whose decision shall be final and conclusive. In the event, in my view, the award is bad to the extent I have already referred to, whichever meaning is attached to the phrase: had the matter depended on the meaning of the phrase it would, in my view, have been necessary to refer the award back to the president for his ruling on the interpretation, a course which should have been adopted by the appellant before the appeal was brought.

As regards the submission that the award was bad in law in relation to gratuities as it required gratuities to be paid on total service as if it were continuous, whereas in fact the total service was a series of periods of separate services under separate contracts and at the end of each period all existing liabilities of the appellant were discharged, here again I find some difficulty in interpreting the award. I also find some difficulty in understanding what the learned Chief Justice meant when he said:

“Broken periods of service, whether the interim period be spent in idleness or employment elsewhere, naturally must be taken into account when computing total service with the appellant.”

In all gratuity schemes of which I have had experience it has been a prerequisite that the service to be taken into account has to be continuous, though in a number of cases specific provision is made enabling broken service in certain circumstances to be linked, the intervening period being disregarded. It seems to me to be a fundamental principle of justice that in the absence of some special reason, gratuities should be computed on continuous service, the more especially when, as in this case, the gratuity is to be based on the final salary. To do otherwise could give rise to what I regard as fundamentally unjust results. For example, an employee might have a period of three years' service at a certain wage, terminate his employment to suit his own convenience and receive in respect of his three years' service a bonus. Many years later he might be taken on again at a greatly increased wage and claim a gratuity based on his final wage for both periods of service when he had already received terminal benefits for the earlier service. Again, an employee may have had a period of service and been dismissed and imprisoned for dishonesty. Subsequently his employer is prepared to employ him again. Is he to be entitled to claim a gratuity computed on both periods of service? Whatever the award may mean

it is clear that the gratuity is to be computed on broken periods of service based on either a specified or final salary. This, in my view, gives rise to a manifestly unjust award. The industrial court is required to make a just award: what is a just award is a matter for the industrial court unless it has come to a decision on a wrong principle of law. In the absence of reasons for an award which appears to be manifestly unjust I can only assume that the industrial court has been influenced by some wrong principle of law. I would also point out that if broken periods of service are to be taken into account without some specific provision setting out the circumstances in which they are to be linked, it would be extremely difficult to determine what is the final period of service which gives rise to the gratuity. I would also point out that it would appear manifestly unjust to require a gratuity to be paid in all circumstances on the termination of employment, even if, apparently, the employment terminates by reason of the imprisonment of the employee for the theft of large sums of money from the employer. For these reasons, in my view, the award is also bad in law in so far as it relates to gratuities. By reason of the specific limitation of the memorandum of appeal and the statements referred to previously made by Mr. Nazareth, I would limit the invalidity of the award for the purposes of this appeal to that part of it which requires periods of service prior to the incorporation of the appellant to be taken into account in computing gratuities, but it would appear desirable for an application to be made to the industrial court for the possible variation of the award if consideration of the matters I have referred to above make such a variation desirable.

The final submission made by Mr. Nazareth was that the award was bad in law as the industrial court had failed to take into consideration the financial position of the appellant and its ability to pay. In support of his submission Mr. Nazareth referred to a number of Indian cases. The principle to be extracted from these cases is, in my view, that the ability to pay is a fundamental element to which regard must be had before an award, which imposes on an employer a liability not imposed by statute, could be said to be a just award. I would endorse that principle and, with respect, I consider the statement of the learned Chief Justice in his judgment that:

“In a civilised country an employee is entitled to reasonable terms of service regardless of the financial position of his employer”

to be too broad, though it is possible that he meant that statement to be related to the context of the immediately preceding sentence. If, however, the industrial court has considered that element, it would not be proper, in my view, for this court to substitute its own view of the ability of the employer to pay for that of the industrial court unless it were manifest that the employer could not pay. In this case it appears from the award that the industrial court examined the documents which contained the same information as was put in the affidavit before this court. Even if this court might take a different view of the ability of the appellant to pay the gratuities (and this does not mean necessarily that it would have done) in my opinion this court cannot substitute its own view for that of the industrial court. The industrial court, having examined the financial position of the appellant, has nevertheless made the award and in this respect I do not consider that any reason has been shown for declaring the award bad in law.

For the reasons set out, in my view the award is bad in law, though its invalidity for the purposes of this appeal should be restricted to that part of it which requires the appellant to pay gratuities computed by taking into account service prior to the incorporation of the appellant, that is May 4, 1955. I would allow the appeal, set aside the judgment and order of the Supreme Court, Aden, in so far as it dismissed the appeal against that part of the award which directed that gratuities should be paid in respect of service prior to the incorporation

of the appellant and made an order as to costs, declare the award invalid in so far as its directs that gratuities shall be paid in respect of such service, and order the appellant to have his costs on the appeal before this court and one-third of his costs in the Supreme Court, Aden. I would also certify the appeal as fit for leading counsel and his junior.

Sir Trevor Gould JA: I have had the advantage of reading the judgment of Newbold JA with which I agree and to which I have nothing to add. The appeal will be allowed and there will be the declaration and orders proposed by the learned Justice of Appeal.

Crawshaw JA: I also agree and have nothing to add.

Appeal allowed. Judgment and order of the Supreme Court set aside. Award declared invalid so far as it directs that gratuities shall be paid for service prior to the incorporation of the appellant company.

For the appellant:

JM Nazareth QC and A Bhatt

For the respondent:

Sir William O'Brien Lindsay

For the appellant:

Advocates: *PK Sanghani*, Aden

For the respondent:

Horrocks Williams & Beacheno, Aden

B E M Petit v Y G Tonnet
[1961] 1 EA 449 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 August 1961
Case Number:	75/1960
Before:	Sir Kenneth O'Connor P, Crawshaw and Newbold JJA
Appeal from:	H.M. Supreme Court of Kenya–Farrell, J

[1] Probate – Practice – Revocation of grant – Contested application for revocation – Whether procedure by action or by motion appropriate – Indian Succession Act, 1865, s. 234, s. 238, s. 244 and s. 261 – Civil Procedure (Revised) Rules, 1948, O. IV, r. 1 and O. L, r. 1 (K.) – Indian Acts (Amendments) Ordinance (Cap. 2), (K.) – Civil Procedure Ordinance (Cap. 5), s. 89 and s. 100 (K.).

Editor's Summary

The appellant, as executor appointed under a will, applied for and obtained a grant of probate thereof. After probate had been granted the respondent sought to lodge a caveat but this was rejected as being too late. The advocates for the parties then agreed that the respondent should, in accordance with the past practice of the Supreme Court, move the court for revocation of the grant. The motion was duly heard and judgment was given revoking the grant of probate. On appeal on the grounds *inter alia* that the judge had no jurisdiction to hear and determine the application for revocation of the grant since the application had been made subsequent to the grant of probate, the appellant submitted that upon the issue of the grant the court became functus officio and had no jurisdiction to set aside the grant; and that any application for revocation of the grant would be governed by Civil Procedure Ordinance, which requires a separate suit and not an interlocutory application by motion. The respondent contended that the question was not one of jurisdiction but of procedure and that the court in the particular circumstances of the case should, if it held that the procedure adopted was incorrect, apply the provisions of s. 100 of the Civil Procedure Ordinance and order that all necessary amendments be made for the purpose of determining the real issue raised.

Held –

- (i) section 238 and s. 261 of the Indian Succession Act, 1865, read with s. 89 of the Civil Procedure Ordinance and O. IV, r. 1, of the Civil Procedure (Revised) Rules, 1948, require that the procedure for the revocation of a grant of probate should be by suit and not by motion and in future contested proceedings for the revocation of a grant made in a non-contentious proceeding should be taken by way of suit. *T. A. de Souza v. P. A. de Souza*, Kenya Supreme Court Probate and Administration Cause No. 182 of 1958 (unreported) approved.
- (ii) a motion in the cause in which the probate was granted seeking revocation of the probate by a person who was not a party to the cause originally, and who had not obtained leave to intervene or be added as a party, brought for a purpose unconnected with the working out of the final order for probate, could not be a proper motion.
- (iii) this was not a case in which it was either appropriate or possible to apply the provisions of s. 100 of the Civil Procedure Ordinance.

Appeal allowed.

[**Editorial Note:** See also *Re the Estate of Fatuma Binti Saleh*, [1961] E.A. 219 (K)].

Cases referred to:

- (1) *In the goods of Baddeley* (1889), 60 L.T. 237.
- (2) *T. A. de Souza v. P. A. de Souza*, Kenya Supreme Court Probate and Administration Cause No. 182 of 1958 (unreported).
- (3) *Penrice v. Williams* (1883), 23 Ch. D. 353.
- (4) *Cristel v. Cristel*, [1951] 2 All E.R. 574.

August 9. The following judgments were read:

Judgement

Newbold JA: This is an appeal from a judgment and order of the Supreme Court of Kenya dated May 20, 1960, whereby, *inter alia*, it was ordered that probate of the will of Bertha Petit, deceased, dated May 6, 1958, granted to the appellant by an order of the Supreme Court, Kenya, dated August 27, 1958, be revoked. On this appeal coming on for hearing, by consent leave was granted to the appellant to add an additional ground of appeal and leave was granted to the respondent to contend that the decision of the Supreme Court should be affirmed on grounds, which were specified, other than those relied upon by that court.

The additional ground of appeal was as follows:

“The learned judge acted without jurisdiction in hearing and determining the respondent’s application in probate and administration cause No. 162 of 1958 such application having been made subsequent to the grant of the probate in the said cause.”

It was agreed by Mr. O’Donovan, who appeared for the appellant, and Mr. Harris, who appeared for the respondent, that if the additional ground of appeal, which went to the jurisdiction of the Supreme Court,

was correct, then that disposed of the appeal. With the consent of both counsel, it was decided to hear the appeal at this stage on that ground only: should the decision be in favour of the appellant then the appeal would be allowed; should it be in favour of the respondent then the appeal would be relisted for hearing in all other respects.

The facts as far as they are relevant to a decision on the additional ground of appeal are as follows:

On May 6, 1958, Bertha Petit made a will whereby she revoked all former wills, appointed the appellant the sole executor of the will and gave, devised and bequeathed all her estate to the appellant. In Probate and Administration Cause No. 162 of 1958 in the Supreme Court, Kenya, the appellant applied by petition for the grant of probate of the will and, on August 27, 1958, probate was granted in non-contentious form. The respondent, who was a beneficiary under a former will, sought to lodge a caveat after probate had been granted, but this was rejected as being too late. Discussions then took place between the advocates for the appellant and the respondent as to the procedure to be followed on an application for revocation of the probate and it was agreed that the procedure to be followed should be by notice of motion in Probate and Administration Cause No. 162 of 1958. It appears that this procedure was in accordance with the previous practice of the Supreme Court. Notice of motion in such cause was accordingly filed applying for revocation of the grant of probate on the grounds specified therein. The motion was heard, evidence was led for both the respondent and the appellant, no objection was taken to the procedure nor to the jurisdiction of the court, and judgment was given, as set out above, revoking the grant of probate. The appellant then gave notice of appeal and subsequently lodged his appeal. The advocate for the appellant then wrote to the advocate for the respondent, referred to the agreement in relation to the procedure to be followed, stated that there had been a recent decision of the Supreme Court in another probate cause to the effect that the procedure in that cause, which was similar to the agreed procedure, was incorrect and pointed out that in duty to his client he felt bound to apply for leave to add this as an additional ground of appeal. Mr. O'Donovan, when arguing the additional ground of appeal, made it clear that should he succeed on that ground, then the question of costs would arise, though, as he pointed out, the appellant's advocates were as much misled by the previous practice as were the respondent's advocates.

Mr. O'Donovan, in support of the additional ground, submitted that the order granting probate was a final order which disposed of the cause without any provision giving liberty to apply; that even if liberty to apply were either expressed or implied in the order, any such application could only be made by a party to the cause and for purposes relating to the working out of the grant of probate; that the court on granting probate became *functus officio* and had no jurisdiction to set aside the grant; and that any application for the revocation of the grant would be governed by the Civil Procedure Ordinance, which requires a separate suit and not an interlocutory application by motion. Mr. Harris, on the other hand, submitted that no question of jurisdiction arose but merely a question of procedure; that the proceedings were similar to review proceedings where the application is made in the same cause; that convenience required the application to be made in the same cause as that in which the grant of probate had been made; that nothing in s. 234 of the Indian Succession Act envisaged a new suit; that the past practice of the court was to make the application by motion in the same cause; and that O. L. r. 1, provides that all applications are to be made by motion unless otherwise expressly provided and that the procedure for revocation of a grant of probate is not otherwise expressly provided for.

The circumstances in which a grant of probate may be revoked are set out in s. 234 of the Indian Succession Act, 1865 (hereinafter referred to as "the Act") which applies to Kenya (*vide* the Indian Acts (Amendments) Ordinance (Cap. 2 of the Laws of Kenya)). There appears to be some divergence of view in the Indian courts as to whether the procedure for revocation should be by civil suit or by petition, but there does not appear to be any authority for saying that it can be done by motion where the validity of the will is in question.

In the United Kingdom the procedure for revocation in all cases where the revocation is contested is by action. It is true that *In the goods of Baddeley* (1) (1889), 60 L.T. 237 seems to suggest that an application for revocation of a grant of probate can be dealt with by motion if all parties consent to it being so heard, but the point does not appear to have been argued as in that case there was no consent. In any event such a procedure would not appear to be the present practice in the United Kingdom: see Tristram and Coote's Probate Practice (21st Edn.) pp. 542 and 587.

In Kenya it appears that the past practice has been to apply by way of motion in the cause in which probate was granted. The correctness of this practice does not appear to have been challenged until very recently when the Supreme Court held in *T. A. de Souza v. P. A. de Souza* (2), Kenya Supreme Court Probate and Administration Cause No. 182 of 1958 (unreported) that the practice was incorrect.

Section 238 of the Act provides that proceedings shall, save as otherwise provided, be regulated so far as circumstances permit by the Indian Code of Civil Procedure, which reference must, I think, be taken to be a reference to the Civil Procedure Ordinance of Kenya (hereinafter referred to as "the Ordinance"). Section 244 of the Act provides that application for probate shall be made by petition, and it is presumably by reason of this section that in Kenya the application for probate is by way of petition. There is no provision in the Act so far as I am aware which provides for the procedure on an application for revocation, so it appears to me that s. 238 and s. 261 of the Act apply, with the result that the procedure is governed by the Ordinance.

Section 89 of the Ordinance provides that the procedure in regard to suits shall, as far as it is applicable, be followed in all proceedings in any court of civil jurisdiction. In my view, this means that unless a different procedure is provided for any particular proceeding, then all proceedings such as the present proceedings which originate a matter shall be by suit, which under O. IV, r. 1, is required to be instituted by presenting a plaint. No procedure governing the application for revocation of probate has been provided, though, presumably, the procedure for applying for the grant of probate is that laid down in s. 244 of the Act, that is, by way of petition. It is true that O. L, r. 1, provides that all applications to the court shall, save where otherwise provided by the Civil Procedure Rules, be by motion; but, in my view, the provisions of s. 238 and s. 261 of the Act read with s. 89 of the Ordinance and O. IV, r. 1, require that the procedure for the revocation of the grant of probate should be by suit and not by motion. Certainly, where the application is contested, a suit would be the most convenient procedure as it would enable pleadings to be filed and the issues to be defined. In any event, in my view, a motion in the cause in which the probate was granted seeking revocation of the probate by a person who was not a party to the cause originally and who has not obtained leave to intervene or be added as a party, brought for a purpose unconnected with the working out of the final order for probate, would not be a proper motion: see *Penrice v. Williams* (3) (1883), 23 Ch. Div. 353 and *Cristel v. Cristel* (4), [1951] 2 All E.R. 574. I agree with the recent decision of the Supreme Court of Kenya in Probate and Administration Cause No. 182 of 1958. In my view, the procedure adopted in this case is, in any event, wrong and in future contested proceedings for revocation of a grant of probate made in a non-contentious proceeding should be taken by way of suit. This seems to be the practice in England: Tristram and Coote's Probate Practice (21st Edn.), pp. 542 and 587. I do not consider that proceedings for the revocation of probate are in any way similar to review proceedings.

Mr. Harris urged that this was not a true matter of jurisdiction, as the Supreme Court undoubtedly had jurisdiction, but merely one of procedure and that in the particular circumstances of the case this court should, if it held that the

procedure adopted was incorrect, apply the provisions of s. 100 of the Ordinance and order that all necessary amendments be made for the purpose of determining the real issue raised on the proceedings. Though the power given to the court by this section is in wide terms, it would not, in my view, enable a motion in one cause to be transferred into a completely separate suit between parties who were not the same parties as in the original cause. The difficulties of such a course are manifest, for example, there would then exist a suit without pleadings. In my view, this is not a case in which it is either appropriate or possible to apply the provisions of s. 100 of the Ordinance.

For the reasons set out, I would allow the appeal and set aside the judgment and order of the Supreme Court on the ground that the procedure followed in this case was not the proper procedure to be followed in seeking revocation of the grant of probate. The question of costs has given me considerable difficulty, as the procedure followed was in accordance with an agreement which in turn was in accordance with the previous practice of the Supreme Court. In all the circumstances, I would order that each party pay its own costs of the motion and of the appeal, with liberty to whichever party eventually succeeds to apply to be indemnified out of the estate.

Sir Kenneth O'Connor P: I agree. I am of opinion that the Supreme Court had no jurisdiction to make the judgment and order dated May 20, 1960, in Probate and Administration Cause No. 162 of 1958 on the application of a stranger to those proceedings. The appeal must be allowed and that judgment and order must be set aside without prejudice to the filing of a suit if the respondent is advised to proceed. There will be an order for costs as proposed by the learned Justice of Appeal.

Crawshaw JA: I have found some difficulty in persuading myself that the appellant is not now estopped from raising this ground of appeal having submitted to the jurisdiction of the court below but, and as I say, with some hesitation, I have agreed the judgments of the Hon. Justice of Appeal and the Hon. President.

Appeal allowed.

For the appellant:

Bryan O'Donovan QC and ZK Ahmed

For the respondent:

Gerald Harris and WL Harragin

For the appellant:

Advocates: *Shapley Barret, Ennion & Marsh*, Nairobi

For the respondent:

Hamilton Harrison & Mathews, Nairobi

P B Patel v The Star Mineral Water and Ice Factory (Uganda) Ltd
[1961] 1 EA 454 (CAK)

Division: Court of Appeal at Kampala

Date of Judgment: 7 September 1961

Case Number: 40/1961

Before: Sir Kenneth O'Connor P, Sir Trevor Gould and Crawshaw JJA

Appeal from: H.M. High Court of Uganda—Jones, J

[1] *Practice – Judgment ex parte – Application set aside – Judgment set aside on terms – Proper order as to costs – Whether terms unduly onerous – Civil Procedure Rules, O. 9, r. 24, (U.).*

Editor's Summary

The respondent obtained judgment *ex parte* against the appellant for Shs. 8,945/-, interest and costs. On application by the appellant for an order to set aside the judgment, the judge ordered that the judgment should be set aside on terms that the appellant should pay Shs. 4,000/- into court, furnish a bond for Shs. 5,000/-, the sureties to be approved by the advocate for the respondent and pay all costs to date before the next hearing. On appeal the appellant submitted that the judge in making the order did not exercise his discretion judicially, and that the conditions were unduly onerous and the costs punitive.

Held –

- (i) there was no reason to suppose that the judge did not exercise a judicial discretion as to the first two conditions though the registrar should have been required to approve the sureties and not the respondent's advocate; and the conditions were not, in the circumstances of the case, unduly onerous.
- (ii) the order for costs should have been limited to those thrown away, including those of the application.

Order of the judge maintained, limited so far as costs to those thrown away.

Cases referred to:

- (1) *Shabir Din v. Ram Parkash Anand* (1955), 22 E.A.C.A. 48.
- (2) *Souza Figuerido & Co. Ltd. v. Moorings Hotel Co. Ltd.*, [1959] E.A. 423 (C.A.).

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court: This is an appeal against an order dated March 3, 1961, made by a judge of the High Court of Uganda under O. 9, r. 24, of the Civil Procedure Rules. The learned judge set aside an *ex parte* judgment for Shs. 8,945/- with interest and costs which had been made against the defendant on December 22, 1960, the defendant having failed to attend on the day fixed for the hearing. The defendant had produced, as a reason for getting the judgment set aside, some evidence that he had been ill on the hearing date. The learned judge seems to have had doubts (which we share) as to the genuineness of the defendant's defence and only set aside the *ex parte* judgment on conditions. The conditions were: (1) payment by the defendant into court of Shs. 4,000/-; (2) the furnishing of a security bond for Shs. 5,000/-, the sureties to be approved by the advocate for the

plaintiff; (3) payment of all costs up to date (including the costs of the application) before the next hearing.

The appellant has appealed on the grounds that the learned judge did not exercise his discretion judicially, and that the conditions were unduly onerous

and the costs punitive. Under the terms of the rule the learned judge had power to impose terms as to costs and payment into court. (See also Annual Practice, 1961, p. 617).

We see no reason to suppose that the learned judge did not exercise a judicial discretion as to conditions numbers (1) and (2) set out above and we see no reason for interfering with his order (which has already been complied with) in those respects, though we would observe that the approval of the sureties required should have been that of the registrar and not of the plaintiff's advocate. The conditions were not, in the circumstances, unduly onerous.

We are of opinion, however, that the learned judge should not have ordered the costs incurred to date to be paid to the plaintiff before the next hearing. The order should have been confined to the costs thrown away (including those of the application): Atkin Judicial Forms (Vol. 7), p. 438. As the learned judge clearly had doubts as to the bona fides of the defence, payment, before the next hearing, of the costs thrown away could be made a condition of the setting aside of the judgment: (*ib.*; and see *Shabir Din v. Ram Parkash Anand* (1) (1955), 22 E.A.C.A. 48, 52). We should have preferred an order that these costs be the plaintiff's costs in any event without a stipulation as to the time of payment; but do not propose to substitute our discretion for that of the learned judge. The order appealed against will, therefore, be maintained, limited, however, as to the condition relating to costs, to the costs thrown away (including the costs of the application).

The case of *Souza Figuerido & Co. Ltd. v. Moorings Hotel Co. Ltd.* (2), [1959] E.A. 423 (C.A.) is a decision on a different Order and rule which are not in all respects analogous to O. 9, r. 24.

As to costs of the appeal: the appellant has succeeded in part and failed in part. In the circumstances, we think we should make no order as to the costs of the appeal.

Order of the judge maintained, limited so far as costs to those thrown away.

For the appellant:

JS Shah

For the respondent:

SP Singh

For the appellant:

Advocates: *JS Shah*, Kampala

For the respondent:

Haque, Dalal & Singh, Kampala

Ali Mahdi v Abdulla Mohamed
[1961] 1 EA 456 (CAD)

Division: Court of Appeal at Dar-Es-Salaam

Date of Judgment: 3 August 1961

Case Number: 31/1961
Before: Sir Kenneth O'Connor P, Crawshaw and Newbold JJA
Appeal from: H.M. High Court of Tanganyika–Law, J

[1] Workmen's Compensation – Jurisdiction – Proper court to determine claim – Accident occurring outside jurisdiction of court in which claim made – Workmen's Compensation Ordinance (Cap. 263), s. 3, s. 16 (1), s. 19 (1), s. 27, s. 28 and s. 44 (T.) – Indian Code of Civil Procedure, 1908, s. 20 (c), s. 21, s. 26 and O. 7, r. 10.

Editor's Summary

The respondent was injured whilst travelling in his employer's vehicle in the Southern Province of Tanganyika. Upon the respondent's application to the Dar-es-Salaam District Court for compensation the appellant was ordered to pay Shs. 3,755/- to the respondent. No objection was taken to the jurisdiction of the court but on appeal to the High Court it was submitted that the Dar-es-Salaam District Court had no jurisdiction to hear the application as the accident had happened within the jurisdiction of another district court. The High Court dismissed the appeal holding that s. 16 (1) of the Ordinance conferred upon a workman a discretion to apply to the court of the district where the accident occurred or under s. 20 of the Code of Civil Procedure at the place where his employee resided and carried on business. On further appeal the appellant contended that by s. 16 (1) of the Ordinance the application must be made "to the court having jurisdiction in the district in which the accident . . . occurred", and that this section established an exclusive jurisdiction upon that court.

Held –

- (i) section 16 (1) of the Workmen's Compensation Ordinance confers an exclusive jurisdiction upon the court of the district where the accident occurred.
- (ii) since s. 16 (1) conferred an exclusive jurisdiction upon a particular court, neither acquiescence nor the express consent of the parties could confer jurisdiction and the assumption by another court of jurisdiction rendered its decision a nullity.

Appeal allowed. Order that the application be returned to the court of a first class magistrate in the district in which the accident occurred, there to be determined.

[Editorial Note: Decision of the High Court of Tanganyika reported at [1961] E.A. 83.]

Cases referred to:

- (1) *Barraclough v. Brown*, [1897] A.C. 615.
- (2) *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government*, [1959] 3 All E.R. 1.
- (3) *Ledgard v. Bull* (1886), 13 I.A. 134.
- (4) *Hansraj Gupta v. The Official Liquidators, Dehra Dun-Mussoorie Electric Tramway Co. Ltd.* (1932), 60 I.A. 13.

August 3. The following judgments were read by direction of the court:

Judgment

Newbold JA: This is an appeal from a judgment and decree of the High Court of Tanganyika sitting at Dar-es-Salaam, dated February 28, 1961, dismissing with costs an appeal from a judgment and order dated October 13, 1960, of the District Court of Dar-es-Salaam district in Workmen's Compensation Cause No. 1 of 1959. By the decision of the Dar-es-Salaam District Court the appellant (then the respondent) was ordered to pay to the respondent (then the applicant) the sum of Shs. 3,755/- and costs in respect of compensation claimed by the respondent for an injury to him arising out of and in the course of his employment by the appellant.

The facts of this matter, so far as they are relevant to this appeal, are as follows:

The respondent was employed by the applicant and it would appear that both the appellant and the respondent resided in Dar-es-Salaam and that the appellant's place of business was in Dar-es-Salaam. In 1956 in the course of his duties the respondent travelled on a motor lorry on a round trip which commenced and ended in Dar-es-Salaam but which, during the course of the trip, went a long way outside the Dar-es-Salaam district. During the trip and while the lorry was on the road between Lindi and Mtwara (an area well outside the Dar-es-Salaam district) the respondent suffered an injury which arose out of and in the course of his employment and as a result he lost the sight of his left eye. In 1959 (the reasons for the delay are irrelevant for the purposes of this appeal) the respondent made an application in the prescribed form in the Dar-es-Salaam District Court claiming compensation from the appellant for the injury suffered and, as stated earlier, he was awarded compensation. When the application was heard in the Dar-es-Salaam District Court no objection was taken by the appellant to the jurisdiction of that court, but on appeal from the decision to the High Court it was a ground of appeal that the Dar-es-Salaam District Court had no jurisdiction to hear this application, as the accident had occurred in a district other than the Dar-es-Salaam district. The learned judge of the High Court dismissed the appeal and, in relation to this ground of appeal, stated the following:

"In my opinion, s. 16 (1) of the Ordinance confers upon a workman a discretion to make his application in the court of the district where the accident occurred. There is nothing restrictive or exclusive about this discretionary power, which is designed solely for the workman's convenience and to exempt him—if he so wishes—from the ordinary requirement of having to sue his employer in the place where the latter lives. The power to sue in the place where the accident occurred is a privilege additional to the ordinary rules as to place of suing. It was open to the workman to sue either at the place of the accident, under s. 16 (1) of the Ordinance, or under s. 20 of the Code of Civil Procedure at the place where his employer resides and carries on business, at his discretion. The Dar-es-Salaam District Court accordingly had jurisdiction to determine the claim, the subject of this appeal, under s. 19 of the Ordinance as read with s. 20 of the Code of Civil Procedure. The appellant is accordingly precluded, by s. 21 of the Code, from objecting to the jurisdiction of the Dar-es-Salaam District Court at this stage. In any event I am satisfied that the Dar-es-Salaam District Court had jurisdiction to determine the claim."

The memorandum of appeal to this court sets out the following ground of appeal:

"The learned judge erred in holding that it was open to the workman (the respondent) to sue either at the place of the accident or under s. 20 of the Code of Civil Procedure at the place where the employer resides and

carries on business, and erred in holding that the Dar-es-Salaam District Court had jurisdiction to determine the claim, the subject of this appeal. The learned judge should have held that the Dar-es-Salaam District Court had no jurisdiction to enforce the respondent's claim by reason of the provisions of s. 16 (1) of the Workmen's Compensation Ordinance (Cap. 263) the accident having taken place between Lindi and Mtwara outside the jurisdiction of the Dar-es-Salaam Court."

In support of this ground of appeal Mr. Fraser Murray, who appeared for the appellant, submitted that s. 16 (1) of the Workmen's Compensation Ordinance (Cap. 263 of the Laws of Tanganyika) (hereinafter referred to as "the Ordinance") conferred on a subordinate court of a first class magistrate of the district in which the accident occurred exclusive jurisdiction and that s. 21 of the Indian Code of Civil Procedure (as applied to Tanganyika by Cap. 2 of the Laws of Tanganyika) (hereinafter referred to as "the Code") had no application to a case when an exclusive jurisdiction is conferred on a particular court, with the result that there is no inherent jurisdiction in any other court. Mr. I. Vellani, who appeared for the respondent, submitted that s. 16 (1) of the Ordinance merely conferred on the court of the district in which the accident occurred a jurisdiction in relation to venue additional to that which all subordinate courts of a first class magistrate have under the Code and that in any event s. 21 of the Code precludes the appellant from taking for the first time in an appellate court an objection based on venue.

The issues posed in this appeal can be simply stated: First, does s. 16 (1) of the Ordinance create in the appropriate court of the district in which the accident occurred an exclusive jurisdiction? Secondly, if it does, does s. 21 of the Code preclude the appellant from objecting to the jurisdiction of another court when such objection is taken for the first time on appeal? I understand it to be conceded by Mr. Fraser Murray that if s. 16 (1) does not confer an exclusive jurisdiction, then the appellant is precluded from making an objection on the ground of jurisdiction for the first time in an appellate court.

On the first issue Mr. Fraser Murray submitted that when a statute creates a new right and sets up the procedure whereby that right is to be enforced, then it is that procedure and that procedure only which may be utilised for enforcing the right. In support of his submission he referred to *Barraclough v. Brown* (1), [1897] A.C. 615, and to the passage in Lord Watson's opinion at p. 622 where he states:

"The right and the remedy are given uno flatu, and the one cannot be dissociated from the other. By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters."

He also referred to *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* (2), [1959] 3 All E.R. 1, where the principle that a person cannot claim to recover by virtue of a statute and at the same time insist upon doing so by means other than those prescribed by the statute was stated to be wholly apposite in cases comparable to the *Barraclough* case (1), though inapplicable on the particular facts of the *Pyx Granite Co.* case (2). Mr. Fraser Murray urged that the Workmen's Compensation Ordinance had given to a workman new rights which he had not previously possessed; that the Ordinance had specified the particular court in which these new rights were to be enforced, that is, the court of the district in which the accident occurred; and that in those circumstances the principle of *Barraclough's* case (1), applied and it was

that court and that court only which had jurisdiction to deal with any application for compensation under the Ordinance. Mr. Vellani, however, submitted that the court having jurisdiction in workmen's compensation matters is that set out in the definition of "court" in s. 3 of the Ordinance, that is, "a subordinate court of a first class magistrate"; that s. 19 (1) of the Ordinance gives jurisdiction to all such courts in accordance with "the law, rules and practice" of such courts (that is in accordance with the Code); that under the Code the Dar-es-Salaam District Court has jurisdiction; and that s. 16 (1) of the Ordinance merely gives an additional right of venue to the court of the district in which the accident occurred, a position made clear by the use of the word "may" in the words "the workman may . . . make an application".

I have had no little difficulty in coming to a conclusion on the first issue. It is undoubted that the Workmen's Compensation Ordinance has given to a workman a new right, but does the Ordinance provide an exclusive jurisdiction in a particular court? Section 3 defines the word "court" and not the words "a court" or "the court". The definition is a general one, relating to a class of court which can and does sit in each district, and is unrestricted in any way. In every section, however, unless the context is one requiring a change, the reference is to "the court" as opposed to "a court". This is a factor, slight though it may be, pointing to a particular court and the only particular court is the one referred to in s. 16 (1), that is, the court of the district in which the accident occurred. Section 19 (1), subject to the provisions of the Ordinance and regulations made thereunder, confers on:

"the court . . . in connection with any question to be investigated or determined . . . all the powers and jurisdiction exercisable by a subordinate court of the first class"

and provides that the law, rules and practice relating to civil actions in such subordinate court shall, *mutatis mutandis*, apply. This section follows closely the section specifying a particular court and in my opinion the use of the words "the court" and the application (subject to the provisions of the Ordinance and regulations) *mutatis mutandis* of the powers and practice of the established subordinate courts to "the court" can mean only the particular court specified in s. 16 (1). Were it not so two anomalies would arise: in the first place, that part of s. 16 (1) of the Ordinance which provided for the application to be made in the court of the district in which the accident occurred would be unnecessary, as para. (c) of s. 20 of the Code would, if s. 19 (1) of the Ordinance had the effect of conferring jurisdiction on courts other than the particular court, have permitted any such application to be brought in the court of the district in which the accident happened; in the second place, the form and manner of the application for enforcing the claim of the workman would have been specified only for applications in the court of the district in which the accident occurred, leaving in the air the form and manner of application in any other court. It is true that in certain circumstances, particularly where the workman is employed in the transport business or has to travel in the course of his employment, the limitation to a particular court may give rise to inconvenience, but in the vast majority of cases the accident will occur at the normal place of employment. It is also true that the limitation to a particular court may give rise to difficulty in certain cases, for example, in occupational disease cases and, possibly, cases in which a seaman is injured, but while these are factors to be considered they are not by themselves determining factors in the construction of the Ordinance. I am fortified in my view that s. 16 (1) confers an exclusive jurisdiction by reason of the provisions of s. 28 of the Ordinance which vests certain powers and imposes certain duties on labour officers of the area in which the accident occurred—a factor which, in my view, seems to

point to a general scheme of relating action under the Ordinance to a particular district.

I turn now to the second issue, which is whether, even if s. 16 (1) of the Ordinance confers an exclusive jurisdiction, s. 21 of the Code precludes the appellant from taking for the first time in an appellate court an objection to the jurisdiction of the subordinate court. In my view this issue is more easily determined. I think it clear that s. 21 of the Code applies only to suits unless its provisions are applied by other legislation to proceedings other than suits. An application under the Ordinance for compensation is clearly not a suit. The question then is, has s. 19 (1) of the Ordinance applied the provisions of s. 21 of the Code to applications under the Ordinance? In my view it is inconceivable that, if the effect of the Ordinance is (as I have held) to vest exclusive jurisdiction in a particular court, it should also have provided by a by-blow, in effect, that jurisdiction should be vested in another court by reason of an omission of one of the parties to take an objection in time. If, as is my view, no court, other than the court of the district in which the accident occurred, has jurisdiction to hear an application, then it is settled law that neither acquiescence nor express consent of the parties can confer jurisdiction, and the assumption by another court of jurisdiction renders its decision a nullity. See *Ledgard v. Bull* (3) (1886), 13 I.A. 134. It would, of course, be different if all subordinate courts of a first class magistrate had jurisdiction and the limitation were purely one of the geographical limits of the court: in such a case, under the Code the application might have been heard in a number of courts, including, in this case, the Dar-es-Salaam District Court, and s. 21 of the Code would apply by reason of an inherent existing jurisdiction in the other courts. As I have set out above, however, this is not the position.

It has also been submitted that r. 30 of the Workmen's Compensation (Rules of Court) Rules, 1949, has the effect of applying s. 21 of the Code. In my view, rules made under the Ordinance cannot have the result of conferring on a court jurisdiction if the Ordinance itself confers on a different court exclusive jurisdiction. Accordingly, in my view, neither s. 19 (1) of the Ordinance nor r. 30 of the Rules applies s. 21 of the Code so as to preclude the appellant from objecting for the first time in an appellate court to the jurisdiction of the subordinate court.

Mr. Vellani has asked that if the decision is against him the application should be returned under O. 7, r. 10, of the Code to be presented to the court in which the application should have been instituted. As it is possible that some question, for example, limitation, might arise if a new application was made at this stage and the return of the application to the court having jurisdiction in the district in which the accident occurred might overcome any such question, I would be in favour of such a course.

For the reasons set out above I would allow the appeal, set aside the judgment and decree of the High Court, declare the judgment and order of the Dar-es-Salaam District Court a nullity and order that the application be returned to the court of a first class magistrate in the district in which the accident occurred to be there determined. As the question of jurisdiction was not taken in the Dar-es-Salaam District Court and as the applicant succeeded in that court, I would order that the appellant should have his costs in this court and in the High Court, but that there should be deducted from such costs the amount of Shs. 600/- which was the amount awarded to the respondent in the Dar-es-Salaam District Court.

Sir Kenneth O'Connor P: I agree. There will be an order in the terms proposed by the learned Justice of Appeal.

Crawshaw JA: I agree that the appeal be allowed on the terms proposed by my brother Newbold, and I also agree the proposed order as to

costs. In my opinion, on a plain construction of s. 16 (1) of the Workmen's Compensation Ordinance the word "may" refers to the words "make an application"; the sub-section then goes on to say in which court such application shall be made. This, as I read it, creates an exclusive jurisdiction in the court in the district where the accident occurred.

I do not think that the other provisions of the Ordinance require one to come to any other conclusion. Section 19 (1) specifies the powers and jurisdiction of "the court" and the law, rules and practice which shall apply to the proceedings in it. The words "the court" mean the court having jurisdiction to investigate or determine the matter in issue; s. 19 (1) does not itself prescribe or specifically refer to any particular court although the court must be a subordinate court of a first class magistrate by virtue of the definition of "court" in s. 2. This definition only specifies the class of court; one has to look elsewhere to find which particular court or courts of that class has jurisdiction in any particular case. The only section which provides for this is s. 16 (1). The learned judge accepted the submission of the respondent that in addition to the court prescribed in s. 16 (1), the court of the district where the employer resides or carries on business has concurrent jurisdiction under s. 20 of the Indian Code of Civil Procedure, 1908, which applies to Tanganyika. That section applies, however, only to "suits" and in my opinion the present application is not a suit within the meaning of the Code.

The Code contains no definition of "suit", but in *Hansraj Gupta v. The Official Liquidators, Dehra Dun-Mussoorie Electric Tramway Co. Ltd.* (4) (1932), 60 I.A. 13, Lord Russell of Killowen, delivering the judgment of their lordships of the Privy Council, said at p. 19:

"the word 'suit' ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint."

He was referring to the word "suit" as it appeared in the Indian Limitation Act which itself contained no definition of it, but I do not see why it should not have the same meaning in the context of the Code of Civil Procedure. In Chitale and Rao (5th Edn.), Vol. I at p. 63 it is said:

"A proceeding therefore which does not commence with a plaint and which is not to be treated as a suit under any other Act, is not a 'suit' and a decision given therein is not a 'decree'".

There is nothing in the Workmen's Compensation Ordinance which says that an application under s. 16 (1) shall be treated as a suit, nor would an application under that section appear to be a "plaint" within the provisions of s. 26 of the Code.

In construing s. 16 (1) of the Workmen's Compensation Ordinance as giving exclusive jurisdiction to the court of the district where the accident arose, it is appreciated that difficulties might in some circumstances arise. An occupational disease might be contracted partly in one district and partly in another or others. An employee might receive an injury outside Tanganyika during the course of his employment; vehicles, for instance of all kinds owned by persons in Tanganyika are constantly being driven by their employees on business to neighbouring territories. Section 27 applies the Ordinance to persons employed on ships. In the case of injury at sea within the territorial waters doubt might arise whether the injury was suffered in the waters of one district or another, whilst if the injury occurred outside the territorial waters there would appear to be no court to which the injured person could make application under the Ordinance. These are anomalies which may receive consideration by the legislature, but are not in themselves sufficient I think to indicate that it was intended to invest jurisdiction in a court or courts other than that specified in s. 16 (1).

It has been argued on behalf of the respondent that even if s. 16 (1) gives exclusive jurisdiction, s. 21 of the Code of Civil Procedure disallows an objection “to the place of suing” being taken for the first time on appeal; in the present case objection was not taken in the court of first instance but, for the first time, on appeal to the High Court. Section 21 relates only to suits and so is not applicable unless expressly applied. I do not think that it can be said that the provisions of s. 21 of the Code are applied. Section 19 (1) of the Workmen’s Compensation Ordinance applies only to proceedings in the court having jurisdiction to hear the application, and so would not as I see it impart provisions relating to proceedings in another court; similarly in respect of regulations made under s. 44 of the Ordinance.

Appeal allowed. Order that the application be returned to the court of the first class magistrate in the district in which the accident occurred, there to be determined.

For the appellant:

WD Fraser Murray and PR Dastur

For the respondent:

IR Vellani

For the appellant:

Advocates: *Fraser Murray, Thornton & Co*, Dar-es-Salaam

For the respondent:

Vellani & Co, Dar-es-Salaam

Siri Ram Kaura v M J E Morgan
[1961] 1 EA 462 (CAN)

Division: Court of Appeal at Nairobi

Date of Judgment: 15 August 1961

Case Number: 71/1960

Before: Sir Kenneth O’Connor P, Sir Trevor Gould and Crawshaw JJA

[1] *Costs – Application for security – Appeal pending – Costs in court below unpaid – Insufficiency of affidavit – No evidence that appellant unable to pay costs – Eastern African Court of Appeal Order-in-Council, 1950, s. 14 – Eastern African Court of Appeal Rules, 1954, r. 19 (6) and r. 60 – Civil Procedure Ordinance (Cap. 5), s. 7 (K.).*

[2] *Costs – Res judicata – Second application for security – First application refused – Appeal – Additional evidence that appellant without means – Whether refusal of first application precludes further application – Eastern African Court of Appeal Order-in-Council, 1950, s. 14 – Eastern African Court of Appeal Rules, 1954, r. 19 (6) and r. 60 – Civil Procedure Ordinance (Cap. 5) s. 7 (K.).*

Editor's Summary

The appellant's action against the respondent having been dismissed with costs, the appellant gave notice of appeal and later filed a memorandum of appeal. The costs already incurred were taxed and after application for payment, the respondent's advocates issued execution by notice to the appellant to show cause against arrest and committal. The process server returned the notice marked "Defendant cannot be traced at the address given". The respondent's advocates then applied to a judge of the appellate court for an order for security for past costs and a stay till the costs were paid. This application was dismissed on the ground that the supporting affidavit contained no evidence of the appellant's inability to pay the past costs and that mere non-payment was insufficient ground for the order sought. The appellant was then traced and, the writ of execution having been served, he appeared and was cross-examined by counsel for the respondent. The appellant swore that he had neither money nor assets and although given time to pay he paid nothing. A second application

was then made to the appellate court which was opposed on the ground that the dismissal of the first application set up an estoppel per rem judicatam. The judge of the appellate court held that whilst the principle could apply to interlocutory proceedings, it was not applicable in the circumstances and he made an order as prayed. On a reference to the full court under r. 19 (6) of the Eastern African Court of Appeal Rules

Held –

- (i) the admission of the appellant that he could not pay and had no assets entirely changed the aspect of the case; moreover the power to order security is discretionary and may be exercised at any time according to the circumstances existing at the time of the hearing of the application, and can be exercised again if circumstances materially change.
- (ii) the order made was a valid exercise of the judge's discretion and he was not precluded from making it by the order previously made.

Order for security confirmed. Proceedings stayed pending compliance with the order.

Cases referred to:

- (1) *Hills v. London Passenger Transport Board*, [1937] 4 All E.R. 230.
- (2) *Ram Kirpal Shukul v. Mussumat Rup Kuari* (1883), 11 I.A.37.
- (3) *Phosphate Sewage Co. v. Molleson*, [1879] 4 A.C. 801.
- (4) *Smith v. Shann and Others*, [1898] 2 Q.B. 347.
- (5) *R. v. Middlesex Justices Ex parte Bond*, [1933] 2 K.B. 1.

August 15. The following judgments were read.

Judgment

Sir Kenneth O'Connor P: This is a reference to the full court under r. 19 (6) of the Eastern African Court of Appeal Rules, (hereinafter called "the Appeal Rules"). The question having been determined by a single judge in favour of the respondent, it was referred at the request of the appellant for determination by the full court.

The history of the matter is not in dispute and is as follows:

The appellant sued the respondent in the Supreme Court of Kenya. The suit was dismissed with costs on June 21, 1960. The appellant gave notice of appeal to this court on July 4, 1960, and subsequently filed a memorandum of appeal. The costs in the Supreme Court were taxed at Shs. 5,750 on October 28, 1960.

The respondent's advocate wrote, on October 28, 1960, to the advocates of the appellant demanding payment. On November 2 a copy of this demand was forwarded to the appellant by his advocates. No payment was made. The respondent's advocates waited a month and then issued execution on December 9, 1960, giving, as the appellant's address, the address to which his advocates had forwarded their demand for payment. The writ of execution, which was in the form of a notice to show cause against arrest and committal, was returned marked by the officer of the court: "Defendant cannot be traced at the

address given.”

A first application under r. 60 of the Appeal Rules was made by the respondent’s advocates on April 10, 1961, to a single judge of this court. This prayed for an order for security for past costs to be paid within such time as the court thought fit and asked that the appeal be not set down for hearing till the costs had been paid and that it be dismissed if they were not paid in compliance with the order.

That application was supported by an affidavit sworn by the respondent on March 17, 1961, in which he stated *inter alia* that the writ of execution had been returned endorsed as mentioned above and that nothing had been paid for

costs. There was nothing in this affidavit as to the appellant's inability to pay. That application was dismissed by the learned Vice-President sitting as a single judge following *Hills v. London Passenger Transport Board* (1), [1937] 4 All E.R. 230, on the ground that the mere non-payment of costs in the court below, without evidence of facts showing the appellant's inability to pay, was not sufficient ground for making an order for security.

The next thing that happened was that the appellant's whereabouts were traced. The writ of execution was re-issued and, on May 5, 1961, the appellant appeared as a judgment debtor before a judge of the Supreme Court of Kenya and was cross-examined by counsel for the respondent, the decree holder. In the course of his cross-examination the appellant said:

"Agree costs taxed against me Shs. 5,750/-. Not paid anything. I have no money. Sick man. I have no assets. My sons support me. I am unable pay this debt."

The appellant was given time to pay, but failed to pay anything.

A second application was then made by the respondent to the learned Vice-President for an order for security for past costs. This was opposed on the ground that the dismissal of the previous application set up an estoppel per rem judicatam which prevented the respondent from making a second application for the same relief. The learned Vice-President did not agree with this argument. In a ruling dated July 11, 1961, he accepted that the principle of res judicata could apply to an interlocutory proceeding; but held that that principle was not properly applicable to an application for security for costs under r. 60 of the Appeal Rules where such application was based on the inability of an appellant to pay such costs. Accordingly, he ordered security for past costs to be furnished and stayed the appeal pending compliance with the order. It is this decision which the appellant has referred to the full court.

The principle of estoppel per rem judicatam may apply to a decision made in the course of execution proceedings and not in a suit: *Ram Kirpal Shukul v. Mussumat Rup Kuari* (2) (1883), 11 I.A. 37. It may be assumed that the principle would apply to other interlocutory applications. In *Shukul's* case (2), it was held that the binding force of the previous judgment depended not upon the provision of the Indian Act (which corresponds to s. 7 of the Kenya Civil Procedure Ordinance (Cap. 5)); but upon general principles of law.

I take it that the general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of the issue, was open to him in a former proceeding between the same parties. I accept also that the mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceeding is no answer to a defence of res judicata: Halsbury's Laws of England (3rd Edn.), Vol. 15, pp. 186, 187.

In *Phosphate Sewage Co. v. Molleson* (3), [1879] 4 A.C. 801 at p. 814 Earl Cairns, L.C., said:

"As I understand the law with regard to res judicata, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My lords, the only way in which that could possibly be admitted would be if the litigant were

prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been, ascertained by me before.”

Taking this as the test, was the fact that the appellant had no assets and was unable to pay the costs awarded against him, a fact which entirely changed the aspect of the case and which could not by reasonable diligence have been ascertained by the respondent when he made his first application? Mr. Winayak for the appellant argued that the respondent had omitted to mention, in his affidavit in support of the first application, the appellant’s inability to pay because he did not know of *Hills v. London Passenger Transport Board* (1), and did not know that it was necessary to show such inability, and that he could have discovered that the appellant had no assets had he tried, or could have refrained from applying until he had discovered this. The point, however, is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application. I think that the admission by the appellant that he was without assets and could not pay the costs was a fact which entirely changed the aspect of the case, and that the respondent could not, by reasonable diligence, have discovered that fact when he made the first application for security because the appellant could not then be found: the officers of the court had failed to find the appellant and the respondent did not know where he was. It has not been suggested, or, if it has, there is no evidence to support the suggestion, that the respondent could have discovered whether the appellant had or had not assets sufficient to pay the costs without interrogating the appellant. There was no receiving order in bankruptcy or anything of that kind which a search would have brought to light. The circumstances at the date of the first application were that the appellant’s whereabouts were unknown and it was not known to the respondent and could not by reasonable diligence be ascertained whether he could or could not pay the costs: the circumstances at the date of the second application were that he had been traced and had admitted on oath that he had no assets and could not pay. I am of opinion that that was an entire change in circumstances and that the principle of *res judicata* did not prevent the learned Vice-President from making the order which he made on the second application.

There is another aspect of the matter. The power to order security for payment of past costs under r. 60 of the Appeal Rules is a discretionary power which, under the rule, may be exercised at any time. In my opinion it is, of its nature, a discretion intended to be exercised according to the circumstances existing at the time of the hearing of the application and can be exercised again if the circumstances change materially (see *Smith v. Shann and Others* (4), [1898] 2 Q.B. 347; *R. v. Middlesex Justices Ex parte Bond* (5), [1933] 2 K.B. 1, 9). In my view, the order made by the learned Vice-President on July 11, 1961, was a valid exercise of his discretion on the facts then before him and he was not precluded from making it by the order (made under materially different circumstances) dismissing the previous application.

The application before the learned Vice-President asked for an order that in default of compliance with the order for security the appeal should stand dismissed with costs, but in view of s.14 of the Eastern African Court of Appeal Order in Council, 1950, he doubted his competency to make such an order. The matter has now been brought before the full court, which is under no such disability. I would, therefore, confirm the order of the learned Vice-President that the appellant do furnish security to the satisfaction of the registrar for payment of the taxed costs of the suit awarded against him in the Supreme Court; but order that such security be furnished within fourteen days from

the date of this present order (in lieu of fourteen days from the date of the Vice-President's order). I would further order that the appeal be stayed pending compliance with this order and that in default of such compliance within the period stipulated the appeal do stand dismissed with costs.

The appellant must pay the costs of this reference and the costs of the last proceedings before the learned Vice-President.

Sir Trevor Gould JA: I agree with the judgment of the learned President and with the orders proposed by him.

Crawshaw JA: I also agree.

Order for security confirmed. Proceedings stayed pending compliance with the order.

For the appellant:

JK Winayak

For the respondent:

JA Mackie Robertson

For the appellant:

Advocates: *Winayak, Johar & Co*, Nairobi

For the respondent:

Kaplan & Stratton, Nairobi

Abid Hussein Quereshi v Mrs Pushpa Ghai
[1961] 1 EA 466 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 July 1961
Case Number:	57/1960
Before:	Sir Alastair Forbes V-P, Sir Trevor Gould JA and Mayers J
Appeal from:	H.M. Supreme Court of Kenya–Harley, Ag. J

[1] Appeal – Damages – Quantum – Artificial limb – Pain and suffering – Loss of earnings – Whether assessment of damages erroneous and inadequate.

Editor's Summary

The appellant, aged twenty-three, an employee of the Ministry of Works, while standing by the roadside

was struck and injured by a vehicle driven by the respondent. The injuries included severe concussion and fractured limbs. The appellant's right leg was amputated after three operations, severe pain was suffered for six months and pain and suffering generally extended over a year. In an action by the appellant for damages the judges awarded special damages which had been agreed and £3,000 general damages. The appellant claimed that the general damages awarded were so inadequate as to be unreasonable and that the judge had failed to consider the cost of replacing and maintaining artificial limbs and the actual and prospective loss of earnings of the appellant.

Held –

- (i) there was no misdirection in the judgment upon any matter of principle and the judge had taken into consideration all the heads under which general damages fell to be considered; accordingly the only question was whether the amount awarded was so small as to be an entirely erroneous estimate.
- (ii) having regard to the evidence regarding the appellant's earnings and prospects £600 was the minimum which ought to be allowed under that head; further the provision and maintenance of an artificial limb in Kenya is much more expensive than in England and the least which should have been awarded under this head was £1,000, which left £1,400 to cover pain and suffering and the loss of amenities of life.

- (iii) the appellant was young and active and throughout his life would have the disability, inconvenience and discomfort of an artificial limb; in view of the diminished value of money the award fell short of what was appropriate by £1,000.

Appeal allowed. Award of general damages increased to £4,000.

Cases referred to:

- (1) *Flint v. Lovell*, [1935] 1 K.B. 354.
(2) *Davies v. Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601; [1942] 1 All E.R. 657.
(3) *James Nyaga bin S. Mushi v. G.J. Beers*, [1961] E.A. 390 (C.A.)

July 17. The following judgments were read:

Judgment

Sir Trevor Gould JA: This is an appeal from a judgment of the Supreme Court of Kenya at Nairobi in an action in which the only matter in issue was the quantum of damages for personal injury. Special damages were agreed at £1,375 4s. 0d., and the learned trial judge awarded the plaintiff (now the appellant) the sum of £3,000 as general damages giving judgment for a total of £4,375 4s. 0d.

The appellant, while standing by the roadside on December 6, 1958, was struck by a motor vehicle driven by the respondent and suffered severe injuries of which the principal were as follows:

1. Severe cerebral concussion, unaccompanied by fracture of the skull, but rendering the appellant unconscious for ten days.
2. Transverse fracture of the femur.
3. Fracture of the right humerus.
4. Injury to the right ribs.

The right leg had to be amputated, finally, after three operations, at a point 3½ inches below the knee. The appellant suffered severe pain for six months and there was pain and suffering extending generally over a year. Hospital treatment extended over eleven months but it would seem that after the first 4½ months hospitalization was spasmodic and not continuous.

At the time of the accident the appellant was twenty-three years old and had been employed for the previous sixteen months at £105 per annum as learner draughtsman with the Ministry of Works. He was active, played cricket, volley ball and table tennis, and did a good deal of bicycling.

The appeal is brought on the ground that the award of general damages is so erroneous and inadequate as to be unreasonable, and the burden of the argument for the appellant was that either the learned judge failed to take into consideration the cost of purchase, replacement and maintenance of artificial limbs, and the actual and prospective loss of earnings of the appellant, or, if he did take those matters into consideration the damages awarded under the other usual heads of damage were quite inadequate.

I do not think that there is any dispute that the heads under which general damages properly fell to be considered in the present case were (a) loss of actual and prospective earnings (b) expenses related to the artificial limb (c) pain and suffering and (d) loss of the amenities of life. Both actual and prospective loss

of earnings were for reasons not material to the appeal included under the head of general damages. The cost of one artificial limb was included in the agreed special damages. I will say at once that, on my reading of the

judgment under appeal, all of these matters were taken into consideration by the learned judge in arriving at his award of £3,000. He did not specify the amount awarded under each head of damage and in that he followed normal practice. There was, then, no misdirection in any matter of principle and the only question for this court is whether the amount awarded for general damages is so small as to make it an entirely erroneous estimate; *Flint v. Lovell* (1), [1935] 1 K.B. 354; *Davies v. Powell Duffryn Associated Collieries, Ltd.* (2), [1942] A.C. 601.

I think that the question can be best approached by considering first the questions of loss of earnings and of the artificial limb, which are, in the circumstances of the case, rather less matters of pure opinion than are those of pain and suffering and of loss of amenities. At the time of the accident, the appellant had been a learner draughtsman for sixteen months and was receiving £105 per annum. Above the position of learner draughtsman in the Ministry of Works are those of assistant draughtsman Grade II and assistant draughtsman Grade I at starting salaries of £187 10s. 0d. plus £159 allowance (£346 10s. 0d.) for Grade II and £387 plus £159 (£546) for Grade I. The evidence was that the appellant's work was good and full of promise, and that prior to the accident he was being considered for a Grade I post and had quite a good chance of making it. He had hoped to have sat for the Senior Cambridge Examination in December, 1959, but could not owing to the accident. Success in that would have enhanced his prospects for Grade I and he would in any event have gone to Grade II. As it was he was taken on again in Grade II on March 1, 1960. In all probability he would during the bulk of the time he was off work have been at least in Grade II and possibly for part of it in Grade I for it does not appear from the evidence that passing the Senior Cambridge Examination is an essential preliminary to appointment to that Grade. In the fourteen months off work he may well have lost a minimum of £350 and in addition he has been set back about two years in taking the examination, and is dependent upon future vacancies in Grade I for a chance of appointment to it. I think that £600 is the absolute minimum which ought to be allowed under this head.

I turn now to the question of the artificial limb. There appears to be virtually no reference to that item of damage in English cases in recent years and it would appear by reference to Halsbury's Laws of England (3rd Edn.), Vol. 27, s. 1094, that artificial limbs are normally supplied, replaced and repaired under the National Health Service at little or no charge. That is not the case in Kenya and the provision and maintenance of an artificial limb was shown by the evidence in this case to be an expensive matter. It follows that any comparison with recent awards of general damages in English cases must be made with this difference in mind.

I do not need to detail the evidence of the cost of providing, replacing from time to time, and maintaining the artificial limb in this case, as the learned judge fixed it at £50 per annum and counsel for the appellant did not complain of this figure. I think the judgment is to be construed as fixing this annual amount in addition to the cost of the first limb which was included in the special damages. The question is at what approximate sum did the learned judge notionally capitalize this annual payment. The appellant was a young man with a long normal expectancy of life. £1,000 invested at 5 per cent. would return the amount required and leave the capital untouched; if that were the only consideration some amount less than £1,000, say £900 would be appropriate. But as the appellant's position in life improved, the income from the investment might well be subject to tax; furthermore the evidence showed that the appellant would require a second limb almost immediately, at a cost of £86, which means that the whole of the sum awarded as damages under this head would not be available for investment. In the case of *James Ngaya Bin S. Mushi v. G. J. Beers* (3), [1961] E.A. 390 (C.A.) this court

reduced, as being on a wrong basis, an award in respect of an artificial arm from £1,485 to £900. The number of replacements and the maintenance required in respect of the artificial arm were substantially less than the necessities of the present case. I feel therefore that the least which should have been included under this head in the award now under consideration is £1,000.

If I am right in what I have said so far the award includes, to cover pain and suffering and the loss of amenities of life, the sum of £1,400. Can this be said to be adequate? There was severe pain and suffering over six months and in a less degree over a further six months. The appellant was young and active and addicted to games many of which will now be denied him. Throughout his life he will have the disability, inconvenience and discomfort inseparable from an artificial limb. The value of money at the present day is such that the cost of amenities to replace those the appellant has lost is high. In my opinion the award as made falls short by approximately £1,000 of what is appropriate.

I have already referred to the authorities which indicate that an appellate court will not vary an award of general damages, unless there has been some error of principle or unless the award appears to be quite erroneous. It ought not to be a case of the appellate court merely substituting its own opinion for that of the court below. I have been in doubt as to whether this court should interfere in the present case but the proposed increase of one third in the general damages is substantial, and I think that there is a possibility that in examining comparable awards made in English cases, it may not have been present to the mind of the learned judge that it was not generally necessary to include in them substantial sums for artificial limbs.

Upon mature consideration I think it is a proper case to increase the award and I would therefore allow the appeal and set aside the decree in the court below as to the amount of damages and as to costs. I would substitute a decree for £4,000 general damages and £1,375 4s. 0d. special damages (a total of £5,375 4s. 0d.) and order that the appellant have the costs of the action in the Supreme Court and of this appeal.

Sir Alastair Forbes V-P: I agree. The appeal will be allowed and there will be orders in the terms proposed by the learned Justice of Appeal.

Mayers J: I also agree and have nothing to add.

Appeal allowed. Award of general damages increased to £4,000.

For the appellant:

DPR O'Beirne

For the respondent:

AE Hunter

For the appellant:

Advocates: *O'Beirne & O'Connor*, Nairobi

For the respondent:

Daly & Figgis, Nairobi

Mwaitige v R
[1961] 1 EA 470 (CAD)

Division: Court of Appeal at Dar-Es-Salaam
Date of judgment: 3 August 1961
Case Number: 84/1961
Before: Sir Kenneth O'Connor P, Crawshaw and Newbold JJA
Appeal from: H.M. High Court of Tanganyika–Sir Ralph Windham, CJ

[1] Criminal law – Charge – Form of charge – One statement of offence – Four counts thereunder giving particulars of each count – Whether charge properly drawn – Criminal Procedure Code (Cap. 20), s. 136 (2) (T.).

[2] Evidence – Judicial notice – District in which coffee is grown – Whether court may take notice that coffee grown in certain districts only.

[3] Criminal law – Evidence – Burden of proof – Failure to observe direction by statutory board – Direction that producers must sell locally produced coffee to union – Coffee sold to dealer – Burden of proof that coffee locally produced – Indian Evidence Act, 1872, s. 105.

Editor's Summary

The appellant was charged on four counts with the sale illegally to a dealer at Mbeya of over five tons of coffee grown by Africans in the Rungwe district. The charge set out in a single statement brief particulars of the statutory offence alleged followed by particulars of the four counts in succession. The charge alleged a contravention of the African Agricultural Products (Coffee) (Rungwe District) Order, 1959, which was made under the African Agricultural Products (Control and Marketing) Ordinance, s. 3 of which enables the Governor-in-Council by order to declare an area to be one in which the production, cultivation and marketing of produce shall be controlled and to establish a board for exercising that control. By s.8 of the Ordinance the board is empowered to give directions as to the sale of products by producers thereof. The Order provided for coffee produced by Africans in the district to be controlled by the Rungwe Native Coffee Board which then made an order that *inter alia* "All Africans growing and producing coffee in the Rungwe district shall comply with any direction of" the board as to the sale of such coffee. The board also issued a direction that all coffee produced by Africans in the district should be sold or marketed through the Rungwe African Co-operative Union. The magistrate convicted the appellant holding that although there was no direct evidence where the coffee sold by the appellant came from, the conclusion was irresistible that it came from Rungwe district because the appellant had said he had not grown or bought any coffee in Mbeya district, and accordingly he could only have got it in Rungwe district. On appeal to the High Court the conviction was upheld and the appellant then brought this second appeal at the hearing of which it was submitted *inter alia* that the direction was ultra vires the powers of the board and that there was insufficient evidence to show that the coffee sold was grown in the Rungwe district.

Held –

- (i) having regard to s. 136 (2) of the Criminal Procedure Code the charge was incorrectly set out; each count constitutes a distinct offence and should in itself contain the statement of offence and particulars thereof.
- (ii) further the charge wrongly stated that the alleged offences were in contravention of the Rungwe District Order; if established the offences would have contravened the direction by the board.
- (iii) the board's powers under s. 8 of the Ordinance are limited to giving orders relating to "producers" only.

- (iv) it was not proved that the appellant was the producer of the coffee nor that the coffee came from the Rungwe district; the magistrate was not entitled to take judicial notice as he did of the fact that if the coffee had not come from the Mbeya district the only place the appellant could have got it was in the Rungwe district.

Appeal allowed. Convictions quashed and sentences set aside.

Cases referred to:

- (1) *Attygalle v. R.*, [1936] 2 All E.R. 116.
- (2) *Seneviratne v. R.*, [1936] 3 All E.R. 36.
- (3) *Mary Ng. v. R.*, [1958] 2 W.L.R. 599.

Judgment

The following judgment prepared by **Crawshaw JA**: was read by direction of the court:

This is an appeal by an African, Tom Mwaitige, against a decision of the Chief Justice of Tanganyika dismissing his appeal against convictions by the resident magistrate, Mbeya. The appellant was charged as follows:

“Offence—section and law: Selling coffee grown in Rungwe district by Africans to a dealer in Mbeya township, Mbeya district, Southern Highlands Province (four counts) in contravention of the African Agricultural Products (Coffee) (Rungwe District) Order, 1959, made under Cap. 284 of the Laws of Tanganyika as published in Government Notice 123 of 1959 and by direction No. 1 of June, 1959, issued by the Rungwe Native Coffee Board under authority given to the board by s. 4 of the said G.N. 123 of 1959.”

Then followed particulars of the four counts. This was not a correct way of setting out the charge. Each count is a distinct offence, and should contain the statement of the offence as well as the particulars thereof (s. 136 (2) of the Criminal Procedure Code).

The African Agricultural Products (Coffee) (Rungwe District) Order, 1959, Government Notice 123 of 1959 (hereinafter referred to as “the Rungwe District Order”) was made under s. 3 of the African Agricultural Products (Control and Marketing) Ordinance (Cap. 284 of the Laws of Tanganyika) (hereinafter referred to as “the Ordinance”). Section 3 enables the Governor-in-Council by order to declare an area to be one in which the production, cultivation and marketing of produce shall be controlled, and to establish a board for exercising that control. Section 8 (1) and s. 8 (2) of the Ordinance read as follows:

- “8.(1) It shall be lawful for a board with the prior approval of the legislative council signified by resolution to order that all producers of a specified agricultural product within the area of the board’s jurisdiction or any part or parts thereof shall comply with any direction of the board as to the sale of such product.
- “(2) Where any order is made in accordance with the provisions of sub-s. (1) of this section, a board may from time to time direct that all producers of the specified agricultural product mentioned in such order within the area of its jurisdiction or any part or parts thereof shall sell such product:
- (a) to the board direct; or
 - (b) to the board through such agency or agencies as the board may specify in any direction given under this sub-section; or

(c) through such agency or agencies as the board may specify in any such direction, as the board may deem expedient.”

It will be seen that under s. 8 (2) a board’s powers are limited to giving directions in respect of “producers” only.

On April 18, 1959, by the Rungwe District Order it was *inter alia* provided:

“4. The production, cultivation and marketing of coffee grown and produced by Africans in the Rungwe district shall be controlled and regulated by the Rungwe Native Coffee Board.”

On June 29, 1959, the Rungwe Native Coffee Board made the Rungwe Native Coffee (Compulsory Marketing) Order, 1959 (Government Notice 241 of 1959) (hereinafter referred to as “the Compulsory Marketing Order”), para. 3 of which reads as follows:

“3. All Africans growing and producing coffee in the Rungwe district shall comply with any direction of the Rungwe Native Coffee Board as to the sale of such coffee.”

The legislative council approved this order on June 5, 1959.

In pursuance of this order the board gave a direction (hereinafter referred to as “the direction”) on June 29, 1959, in the following terms:

“By virtue of the powers granted to the Rungwe Native Coffee Board, by the Rungwe Native Coffee (Compulsory Marketing) Order, 1959, it is hereby directed that all coffee grown or produced by Africans in the Rungwe district shall be sold or marketed through the Rungwe African Co-operative Union and its affiliated societies.”

It was, therefore, wrongly stated in the charge that the alleged offences were in contravention of the Rungwe District Order. The offences, if established, would have been in contravention of the direction given by the board under the Compulsory Marketing Order. The defects in the charge were not raised by the defence at the trial nor in the subsequent appeals, and we are satisfied that they have caused no miscarriage of justice.

Briefly, the particulars of the offences are that between September 4 and December 5, 1960, the appellant illegally sold to a certain H.R. Virani, a licensed coffee dealer in Mbeya, a total of 5,772 kilos of coffee (equivalent to approximately 5½ tons we understand) grown by Africans in the Rungwe district. The appellant denied that he had sold any coffee to Virani, but the magistrate came to a finding on the evidence that he had sold the coffee to Virani as alleged, and this finding of fact has not been contested on this appeal.

The first ground of appeal before us was abandoned by Mr. Fraser Murray, who appeared for the appellant. The second ground of appeal complained that the learned Chief Justice:

“erred in law in holding that there was sufficient evidence to support the learned magistrate’s finding that the coffee was grown in the Rungwe district.”

The third and fourth grounds of appeal are as follows:

“(3) The learned Chief Justice erred in law in holding that the offence alleged was proved if it could be shown that there had been a sale of coffee otherwise than through the union (meaning thereby the Rungwe African Co-operative Union). The learned Chief Justice further erred in holding that any previous sale of this coffee through the union would be a matter

peculiarly within the knowledge of the appellant. The appellant contends that the offence in question is proved only if it is shown that the coffee has not been sold through the union. If sold through the union, subsequent sales through other channels are not illegal. There was no evidence to show that the transactions in the present case had not been preceded by sales through the union, and there was no evidence to show that the appellant would necessarily know, in the case of coffee coming to his hands, the entire previous history of the coffee. The learned Chief Justice should therefore have held that it was incumbent upon the Crown to prove that the coffee in question had not been sold through the union.

- “(4) (a) The direction (R.M.C.B. direction No. 1) is ultra vires because the board had no power to order that all coffee grown or produced by Africans in the Rungwe district should be sold or marketed through the R.A.C.U. The board had power to direct only that producers should sell coffee produced by them through an agency (i.e. the R.A.C.U. in this case).
- “(b) If the direction is not ultra vires it operates only to prohibit producers selling coffee produced by them through the agency. There was no evidence that the coffee in question was produced by the appellant.”

It will be convenient to deal first with grounds (3) and (4). As we have seen, the board's powers under s. 8 are limited to giving orders relating to “producers”. In the context of the Ordinance we think that by “producers” must be meant growers or persons entitled to harvest the crop. It is, as we understand it, the complaint in ground (4) of the appeal that, this being so, the wording of the direction was too wide, for it would relate to the sale or marketing of coffee grown by an African in the Rungwe district irrespective of whether the person actually effecting the sale or marketing was the producer, or the person who had acquired the coffee from the producer. It was submitted by Mr. Fraser Murray that although the producer may commit an offence by selling coffee to a person other than the board, there is no power in the Ordinance which enables the board to control the sale or marketing of coffee by a purchaser from the producer. It was submitted by Mr. Troup that, even so, the direction is not wholly ultra vires and that it would apply so far as it is valid: that is, it would apply to sales by African producers of coffee grown in the Rungwe district. We think that this contention would be correct, if the direction has the meaning ascribed to it by Mr. Fraser Murray. The direction is not free from ambiguity, but in view of the wording of s. 8 of the Ordinance we think that it should be read as if the words “by them” were added after the words “shall be sold or marketed”. The validity of the direction was not questioned at the trial or before the learned Chief Justice.

This leaves the question whether the coffee was in fact grown by the appellant and, if so, (the question raised by ground (2) of the memorandum of appeal) whether it was grown in the Rungwe district; other considerations would arise if the appellant was selling coffee grown in that district on behalf of other producers. It was not suggested by the defence that if the coffee was grown in the Rungwe district it might have been grown by a non-African.

The trial magistrate said:

“Although there is no direct evidence to show where the coffee sold by accused came from, the conclusion that it came from Rungwe district and was grown by Africans is to my mind irresistible. Accused said he had not grown or bought any coffee in Mbeya district; then if that is so, and I am sure it is, the only place he could have got it is in Rungwe district, and obviously from Africans, as nobody else grows sufficient to have sold him the amount he sold to Virani.”

The magistrate then cast doubt on the evidence of the appellant and a certain producer Yoram (whose coffee it seems was pledged to the appellant) as to the amount of coffee they said they obtained from “the” shambas (by which it is presumed is meant “their” shambas) and went on to say,

“he [the appellant] was able, as he is a trader, to get hold of more coffee through people in the neighbourhood and bring it here [Mbeya] for sale”.

It seems therefore that it was the opinion of the magistrate that part at least of the coffee sold by the appellant was coffee which had not been produced by him, and indeed there is no evidence that any of it had been produced by him. As we have said, the significance of the question whether the appellant was himself the producer, or whether he had acquired it from other Africans who had produced it in the Rungwe district, was not appreciated at the trial or taken as a point before the learned Chief Justice; the question taken was the broader one, “Was the coffee grown by Africans in the Rungwe district”? It is not really necessary to answer this, for it seems most probable (as the magistrate appears to have found) that the coffee or at least part of it, had not been produced by the appellant, and for that reason alone the appellant must succeed in his appeal. The appellant said that he had inherited a coffee shamba from his father in 1960, and that “before that” he had had a coffee shamba of his own. It is not absolutely clear whether he still owned the latter at the relevant time nor whether it was in the Rungwe district, but this probably was so for a prosecution witness, Fairweather, who was a field officer in the agricultural department stationed at Tukuyu, confirmed the appellant’s evidence that the trees were young and non-bearing. There is no evidence how many trees were on the inherited shamba, but the appellant said he obtained fifteen bags of coffee from it in 1960 which he sold through a society which, it seems to be accepted, came within the direction, and an officer of the society confirmed that this sale did take place.

As we have said, the appeal succeeds on the ground that it has not been proved that the appellant was the producer of the coffee, but we think we should add that, in our opinion, it was not proved either that the coffee came from the Rungwe district. The grounds on which the magistrate made his finding as to this seem to be that the appellant lived in the Rungwe district where a considerable amount of coffee is grown; that the appellant said he had never grown or bought coffee at Mbosi, or in any other part of the Mbeya district, and that therefore the only place he could have obtained it was in the Rungwe district. In supporting this finding the learned Chief Justice said:

“he [the appellant] said he ‘never obtained coffee from anyone else, only coffee through my father’s hands from father’s shamba’. Therefore any coffee that he sold to Virani must on his own admission have come from the Rungwe district”.

We think, with the greatest respect, that these conclusions of the magistrate and learned Chief Justice are not justifiable inferences from the appellant’s evidence. The appellant’s defence was that he had never sold any coffee to Virani and, by implication, that the only coffee that he had sold was that from the inherited shamba and some he had obtained from Yoram’s shamba. Thus, he was in effect saying that not only had he not obtained any coffee from Mbosi or any part of the Mbeya district, but that he had not obtained any from the Rungwe district either, except from the shambas named. The finding that he sold coffee to Virani meant that the appellant was lying, but his was an overall denial and we do not think that any admission can properly be inferred from it. There was no evidence to show who produced the coffee, and likewise there was no evidence to show where the coffee came from. It might, for all that

is known, have come from a district other than the Rungwe or Mbeya district. Learned Crown counsel has submitted that the magistrate was entitled to take judicial notice of the fact that if it had not come from the Mbeya district “the only place he could have got it is in the Rungwe district”. There is no evidence to this effect and we do not agree that this is a matter of which judicial notice could be taken.

Learned Crown counsel has made a further submission, that the identity of the producer of the coffee and the district in which it had been grown would be facts peculiarly within the knowledge of the person selling it, and that the onus of proof therefore shifted to the accused. Reliance is presumably placed on s. 105 of the Indian Evidence Act, as amended by s. 8 (1) of the Indian Acts (Application) Ordinance of Tanganyika, but we do not think that it can be said to apply in the present circumstances. Their lordships of the Privy Council have held on several occasions, when considering similar provisions in the law of Ceylon and Singapore, that the obligation cast by s. 105 on an accused person of proving any fact especially within his knowledge does not cast upon him the burden of proving that no crime was committed: *Attygalle v. R.* (1), [1936] 2 All E.R. 116, 117; *Seneviratne v. R.* (2), [1936] 3 All E.R. 36, 49, 50; *Mary Ng. v. R.* (3), [1958] 2 W.L.R. 599. Moreover, as Mr. Fraser Murray has said, it does not even necessarily follow that a seller of coffee would himself know these facts, for the coffee might have passed through other hands since it left the producer and before the accused acquired it. We appreciate that these are matters of which a seller would normally be aware, and which it might normally be very difficult for the prosecution to prove, but, in the absence of statutory enactment transferring the onus of proof, it lies upon the prosecution to prove all the ingredients of the offence. That principle is specifically recognised by s. 105 (2) (a).

We allow the appeal on all four counts, quash the sentences of imprisonment and set aside the fines; if the fines or any part thereof have been paid they must be refunded to the appellant.

Appeal allowed. Convictions quashed and sentences set aside.

For the appellant:

WD Fraser Murray

For the respondent:

AM Troup (Crown Counsel, Tanganyika)

For the appellant:

Advocates: *Fraser Murray, Thornton & Co*, Dar-es-Salaam

For the respondent:

The Attorney-General, Tanganyika

Jivabhai Rehemtulla v Anwari Hotel
[1961] 1 EA 476 (CAK)

Division: Court of Appeal at Kampala

Date of judgment: 14 September 1961

Case Number: 3/1961

Before: Sir Alastair Forbes V-P, Sir Trevor Gould and Crawshaw JJA

[1] Practice – Appeal – Extension of time – Application for extension for filing appeal – Decree not extracted – Eastern African Court of Appeal Rules 1954, r. 56.

Editor's Summary

On an application by an intending appellant for an extension of time to file an appeal, the respondent objected that the decree from which it was intended to appeal had not been extracted.

Held –it is not necessary under the Court of Appeal Rules to extract a decree before making an application for an extension of time for filing an appeal, though, no doubt, under r. 56 the court or judge may, if it is deemed necessary, require the production of the decree before dealing with the application.

Objection overruled.

No cases referred to in judgment

Judgment

Sir Alastair Forbes V-P: read the following order of the court: We have no doubt that the extraction of a decree before the making of an application for extension of time for the filing of an appeal is not required by the rules of this court, though, no doubt, under r. 56, the court or judge may, if he deems it necessary, require the production of the decree before dealing with the application.

The application for extension of time is allowed, an extension of thirty days from today being granted.

The question whether or not a preliminary decree can properly be extracted at this stage is one which should be argued after the appeal is filed.

The costs of the application to a single judge have been ordered to be paid by the intending appellant in any event. That order must stand. The intended respondent has not succeeded on the reference to the full court, and we accordingly order that the costs of reference be paid by it in any event.

Objection overruled.

For the applicant:

NG Patel

For the respondent:

PJ Wilkinson QC and BE De Silva

For the appellant:

Advocates: *Natwarlal & Manilal*, Jinja

For the respondent:

Buganda Timber Co Ltd v Mulji Kanji Mehta
[1961] 1 EA 477 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 28 July 1961
Case Number: 10/1961
Before: Sir Kenneth O'Connor P, Sir Trevor Gould and Newbold JJA
Appeal from: H.M. High Court of Uganda–Lewis, J

[1] Money-lender – Loan to company upon debenture – Debenture purporting to charge land and other property – Validity of debenture – Debenture not registered under Registration of Titles Ordinance – Whether transaction within exception to Money – lenders’ Ordinance – Money-lenders’ Ordinance, 1951, s. 3, s. 7 and s. 22 (1) and s. 22 (3) (U.) – Registration of Titles Ordinance, s. 9 (3), s. 51, s. 91, s. 114, s. 115, s. 134, s. 138 and s. 148 (U.) – Money-lenders’ Ordinance (Cap. 307), s. 3 (1) (b) (K.) – Companies Ordinance (Cap. 212), s. 80 (U.).

Editor’s Summary

The appellant company sued for a declaration that a debenture charging *inter alia* the company’s real and leasehold properties to secure Shs. 20,000/= was void and unenforceable and an injunction to prevent a sale on the ground that the respondent was a money-lender and had failed to comply with the Money-lenders’ Ordinance. The trial judge found that the respondent was a money-lender, but that the transaction was within s. 22 (1) (c) of the Money-lenders’ Ordinance and, therefore, the Ordinance did not apply. On appeal it was submitted *inter alia* that the debenture did not fall within s. 22 (1) (c) of the Money-lenders’ Ordinance since it included moveable property as well as land and that the charge which it purported to effect on land was not, therefore, “the security” for the repayment of the loan; that as the debenture was not registered under the Registration of Titles Ordinance it could not, and did not, create a charge on land and therefore, s. 22 (1) (c) was not applicable and the Money-lenders’ Ordinance was not ousted. It was common ground that there had not been compliance with s. 3 and s. 7 of the Money-lenders’ Ordinance and that if that Ordinance applied, the debenture was unenforceable.

Held –

- (i) the words “where the security for repayment of the loan and loan thereon is effected” in s. 22 (1) (c) of the Money-lenders’ Ordinance point to a mortgage or charge which effectually creates a security and not to some instrument which requires the execution of another instrument to make it effectual or to an instrument, whether it be mortgage or charge, which is ineffectual as a security by reason of being unregistered.
- (ii) since there was no express evidence whether the land had been brought under the operation of the Registration of Titles Ordinance, it was not possible to say whether s. 9 (3) or s. 51 of that Ordinance applied and both must be considered.

- (iii) the debenture did not effect a security upon immovable property within s. 22 (1) (c) of the Money-lenders' Ordinance, whether the land was under the operation of the Registration of Titles Ordinance or not.
- (iv) section 22 (1) (c) of the Money-lenders' Ordinance was not applicable in that the debenture, not being registered under the Registration of Titles Ordinance and not being accompanied by a deposit of the certificate of title, did not effect a legal or equitable mortgage or charge upon the immovable property, if any, of the company.

Appeal allowed. Declaration that the debenture was unenforceable. Injunction prayed for granted.

Case referred to:

(1) *Somchand N. Shah v. Chimanbhai M. Patel*, [1961] E.A. 397 (C.A.).

July 28. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from the High Court of Uganda. In its plaint dated January 17, 1959, the plaintiff company (the present appellant) claimed a declaration that a debenture (hereinafter called "the debenture") which it admitted having given to the defendant/respondent to secure a loan by the respondent of Shs. 20,000/- was void on the ground that the respondent was a money-lender and had not complied with the provisions of s. 3 and s. 7 of the Money-lenders' Ordinance, 1951 (Ordinance No. 31 of 1951). The appellant said that certain payments had been made to account of the loan, that a sum of Shs. 7,033/73 was still outstanding and that the respondent was threatening to seize and sell the property of the appellant company in purported exercise of the powers contained in the debenture. The appellant, as already mentioned, claimed a declaration that the debt was void and unenforceable and it also claimed an injunction to prevent the seizure and sale of the property.

The defendant/respondent denied that he carried on business as a money-lender. He admitted lending Shs. 20,000/-, but denied that that was a transaction within the Money-lenders' Ordinance. He said that, not being a money-lender, he was under no obligation to comply with the Money-lenders' Ordinance. He submitted that the provisions of that Ordinance did not apply to the transactions in the suit and that the debenture was valid and enforceable and that he was entitled to enforce it.

The relevant parts of the debenture are as follows:

"The company as the beneficial owner hereby charges with the said payment its undertaking and all its property and assets whatsoever and wheresoever present and future including its uncalled capital and goodwill. The said charge shall be a specific charge on the real and leasehold properties now belonging to the company and its goodwill and a floating charge on the other assets and property of the company.

.....

The conditions above referred to:

"1. This debenture is to rank as a first charge on the property and assets hereby charged."

The learned judge considered whether the respondent was a money-lender and whether the debenture was a charge upon immovable property within s. 22 (1) (c) of the Money-lenders' Ordinance. He held, on ample evidence of other transactions, that the respondent was a money-lender. He considered s. 22 (1) (c) of the Money-lenders' Ordinance and apparently held it applicable; but his actual finding was that the respondent was deemed not to be a money-lender by s. 22 (3) of the Money-lenders' Ordinance. That sub-section clearly had no application because it was proved that the respondent had lent money on transactions other than those set out in s. 22 (1). What the learned judge apparently intended to find was that the transaction effected by the debenture fell within s. 22 (1) (c) and, therefore, that the provisions of the Money-lenders' Ordinance did not apply. Accordingly he refused the declaration and injunction sought.

It was argued by Mr. Patel for the appellant on the appeal first, that the debenture did not fall within s. 22 (1) (c) of the Money-lenders' Ordinance since it included movable property as well as land and that the charge which it purported to effect on land was not, therefore, "the security" for the repayment of the loan; and secondly, that as the debenture was not registered under the Registration of Titles Ordinance (Cap. 123 of the Laws of Uganda) it could not, and did not, create a charge on land and that, accordingly, s. 22 (1) (c) had no application and that the provisions of the Money-lenders' Ordinance were not ousted. It was common ground that the provisions of s. 3 and s. 7 of the Money-lenders' Ordinance had not been complied with and that if that Ordinance applied, the debenture was unenforceable.

Section 22 of the Money-lenders' Ordinance, so far as material, reads:

"22. (1) The provisions of this Ordinance shall not apply:

.....

- (c) to any money-lending transaction where the security for repayment of the loan and interest thereon is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of money-lending upon such mortgage or charge."

The words "where the security . . . is effected" point, in my opinion, to a mortgage or charge which effectually creates a security and not to some instrument which requires the execution of another instrument to make it effectual or to an instrument, whether it be a mortgage or charge, which is ineffectual as a security by reason of being unregistered.

Regarding Mr. Patel's first point, this court had occasion recently to deal with a similar argument with reference to the words "the security" appearing in s. 3 (1) (b) of the Kenya Money-lenders' Ordinance (Cap. 307 of the Laws of Kenya). The Kenya section is not identical with s. 22 of the Uganda Ordinance, but is sufficiently similar to make the Kenya case authoritative and binding. That case is *Somchand N. Shah v. Chimanbhai M. Patel* (1), [1961] E.A. 397 (C.A.). We there held that "the security" in s. 3 (1) (b) of the Kenya Money-lenders' Ordinance (corresponding to s. 22 (1) (c) of the Uganda Ordinance) did not mean "the only security" and that the paragraph applied to a case where promissory notes were described as the security for a money-lending transaction with a charge on land as additional security. I respectfully adopt the reasons given in the judgment of Gould, J.A., in that case as being *mutatis mutandis* applicable to the present case. In my opinion, Mr. Patel's first contention fails.

Mr. Patel's second submission raises a difficult question and one which, so far as I am aware, has not been decided in Uganda. In brief, he points to s. 9 (3) of the Registration of Titles Ordinance and says that the charge which the debenture purported to create was a dealing in land and could not operate to pass any estate or interest whatever.

Section 9 of the Registration of Titles Ordinance occurs in Part III of the Ordinance which is headed "Bringing Land under the Ordinance". Sub-section (1) and sub-s. (2) of s. 9 require grants of all surveyed Crown lands and final mailo certificates not issued prior to the commencement of the Ordinance to be registered. Sub-section (3) reads:

"No dealing with any land however held prior to this Ordinance shall, after the commencement of this Ordinance, operate to pass any estate or interest whatever, until such dealing is registered in manner herein provided."

If this provision were intended to have a general application throughout the Ordinance, as Mr. Patel contends, I do not think it would have been relegated

to a sub-section in a section and a part which deal with the subject of bringing land under the Ordinance. Further, if it were intended that land already brought under the Ordinance should be governed by s. 9 (3), then s. 51 would be largely redundant. I think that s. 9 (3) applies to land not yet brought under the operation of the Ordinance and is designed to encourage or compel the bringing of land under the Ordinance in accordance with the scheme set out in Part III and that when the land has been brought under the operation of the Ordinance, s. 51 takes over.

It is common ground that the debenture in the present case was not registered in the Register of Titles though we were informed that it had been registered in the register of charges kept by the company under s. 80 of the Companies Ordinance (Cap. 212 of the Laws of Uganda). No form of charge (as distinct from mortgage) is provided in the Registration of Titles Ordinance and the debenture is not, of course, in the form provided in s. 114 and the Eleventh Schedule for mortgages. I do not think that the debenture could be registered under the Registration of Titles Ordinance in its present form, though it might be protected to some extent by lodging a caveat under s. 148. If the certificate of title had been deposited under s. 138 an equitable mortgage would have been created; but I understand that this was not done. There is no express evidence that the company, in fact, has any land and nothing to show where (if it has) the land is situated or whether the land has been brought under the Registration of Titles Ordinance. I think that it must be assumed from the fact that the debenture expressly purports to be a charge on the “real and leasehold properties now belonging to the company” that the company does own land which it intended to charge; but there is nothing to show whether that land has been brought under the operation of the Registration of Titles Ordinance. It is not, therefore, possible to say whether s. 9 (3) or s. 51 of the Registration of Titles Ordinance applies to it and both must be considered. Sub-s. (3) of s. 9 is the provision on which Mr. Patel relies but, as I have already indicated, that subsection only applies if the land has not been brought under the operation of the Ordinance. This seems most unlikely. It will, however, be necessary to deal first with the case on that footing.

Mr. Phadke, for the respondent, argued that the charge contained in the debenture was not a “dealing with any land” and that, therefore, s. 9 (3) of the Registration of Titles Ordinance did not apply to it. I agree with Mr. Phadke that if the charge contained in the debenture in the present case was not a “dealing with land” then s. 9 (3) would not apply to it, so as to make registration essential. Further, even if the charge were a “dealing with land” within sub-s. (3), that sub-section would not take it out of s. 22 (1) (c) of the Money-lenders’ Ordinance if the charge were effectual to create a security over land notwithstanding that, being unregistered, it could not operate to pass any estate or interest in the land. Two connected questions, therefore, arise: (i) is the charge contained in the debenture a “dealing with any land” within sub-s. (3) of s. 9 of the Registration of Titles Ordinance; and (ii) if so, can such a charge be effectual as a security upon immovable property, notwithstanding that it does not operate to pass any estate or interest in the land ?

With regard to question (i) above, as a matter of construction of the sub-section, “dealing” in sub-s. (3) is not confined to dealings which operate to pass an estate or interest in land and would include attempted dealings. In my opinion, the debenture could constitute a “dealing with any land” within s. 9 (3) of the Registration of Titles Ordinance.

Then, is the charge contained in the debenture effectual as a security upon immovable property, notwithstanding that, for lack of registration, it does not operate to pass any estate or interest in the land? In my opinion, it is not. But for s. 9 (3), the effect of the words of charge in the debenture would be (apart from their effect on the movable property) to create an equitable interest

in the immovable property of the company and to confer a right of payment out of that property, enforceable (after certain preliminaries) by sale of the property. But s. 9 (3) negatives the creation of that interest and thereby, in my opinion, renders the charge ineffectual as a security “upon immovable property” within s. 22 (1) (c) of the Money-lenders’ Ordinance. I conclude, therefore, that if the land is not under the operation of the Registration of Titles Ordinance, the debenture is not an effectual security upon immovable property within s. 22 (1) (c) of the Money-lenders’ Ordinance.

It is now necessary to examine the position if the land is (as seems most likely) under the operation of the Registration of Titles Ordinance. Since the debenture is an unregistered instrument, s. 51 of the Registration of Titles Ordinance enacts that it is ineffectual to pass any estate or interest in the land or to render the land liable to a mortgage. Can it render the land liable to a “charge”? The Ordinance is obscure on the question of charges. There is no definition of “charge”, no provision for registration of a charge and no form of charge which may be registered. But there is a provision for discharging a registered charge. Section 134 provides for the registration of a release from “any registered mortgage or charge” and the heading of the Twelfth Schedule is “Release of Mortgage or Charge” though the form itself refers only to a mortgage. There is a form of “Transfer of Mortgage or Charge” in the Seventh Schedule, though s. 91 which deals with transfers does not expressly mention charges. Since there is no provision for registering charges, these provisions are difficult to reconcile unless “charge” is used as synonymous with mortgage, or with second or equitable mortgage. Section 51 and s. 115 clearly indicate that a legal mortgage does not have effect as a security over land unless and until it is registered, and I am not prepared to hold that a charge is in a better position to effect a security upon the land than a legal mortgage.

Accordingly, if the land has been brought under the Registration of Titles Ordinance and s. 51 applies to it, the charge contained in the debenture, being an unregistered instrument, is, in my opinion, ineffectual to create a security upon the immovable property within s. 22 (1) (c) of the Money-lender’s Ordinance.

This is not to say that an unregistered and unregistrable charge is without any effect. It may well entitle the charge to call for a registrable document or it may be protected to some extent by a caveat or become an equitable mortgage by a deposit of the certificate of title; but, in my view, it does not of itself have effect as a security over land.

In my opinion, the debenture in this case did not effect a security upon immovable property within the meaning of s. 22 (1) (c) of the Money-lenders’ Ordinance, whether the land was under the operation of the Registration of Titles Ordinance or not. At the least, the respondent on whom the burden lay of proving that the debenture came within the exception provided by that paragraph, has not convinced me that the debenture does come within it; and I do not think that the learned judge would have been convinced either if he had considered the effect of the Registration of Titles Ordinance.

In the result, I would confirm the learned judge’s finding that the respondent was a money-lender; but set aside his finding on issue No. 2 that the respondent was deemed not to be a money-lender by virtue of s. 22 (3). I would also hold that s. 22 (1) (c) of the Money-lenders’ Ordinance does not apply, in that the debenture, not being registered under the Registration of Titles Ordinance and not being accompanied by a deposit of the certificate of title, does not effect a legal or equitable mortgage or charge upon the immovable property, if any, of the company. In my opinion, the plaintiff/appellant should have a declaration that the debenture is unenforceable, and the injunction for which he prayed. I have reached this conclusion with regret, as the money is admitted to be owing and the defence is technical. However,

the respondent who is clearly a moneylender

must take the consequences if he ignores the provisions of the Money-lenders' Ordinance. The appellant should have the costs of the appeal and the costs in the High Court.

Sir Trevor Gould JA: I agree and have nothing to add.

Newbold JA: I also agree.

Appeal allowed. Declaration that the debenture was unenforceable. Injunction prayed for granted.

For the appellant:

ML Patel

For the respondent:

YV Phadke

For the appellant:

Advocates: *Manubhai Patel & Son*, Kampala

For the respondent:

Parekhji & Co, Kampala

Alexander Arthur Ojera v The Returning Officer and A A Banya
[1961] 1 EA 482 (HCU)

Division: High Court of Uganda at Gulu

Date of judgment: 3 July 1961

Case Number: 3/1961

Before: Sir Audley McKisack CJ

[1] Elections – Ballot papers – Validity – Papers not perforated nor marked with official stamp – Papers marked with voters' registration numbers – Whether acceptance of defective papers unlawful – Legislative Council (Elections) Ordinance 1957, s. 38 (1), s. 46, s. 60 (2), s. 65, s. 66 (U.) – Election Petitions Directions 1958, r. 2 (2) (U.).

Editor's Summary

The petitioner was an unsuccessful candidate for Uganda Legislative Council at a general election held on March 24, 1961. The first respondent was the returning officer and the second respondent was the successful candidate. The petition alleged that the acceptance of void ballot papers under s. 46 (1) of the Legislative Council (Elections) Ordinance, 1957, was unlawful, and sought *inter alia* a declaration that the second respondent's election and return were void. At the hearing of the petition it was common

ground that a substantial number of ballot papers cast for each candidate did not comply with the Ordinance because they were not perforated nor stamped with an official mark, or because they had figures written on them in pencil from which the electors could be identified. The returning officer claimed that both candidates had agreed with him that the defective votes should not be rejected.

Held –

- (i) the provisions of s. 46 (1) of the Legislative Council (Elections) Ordinance, 1957 are mandatory and give the returning officer no power to accept a ballot paper which either lacks the official stamp or bears writing by which a voter can be identified; such ballot papers must be rejected.
- (ii) the word “decision” in s. 46 (3) of the Ordinance could only refer to a decision whether a ballot paper bears the official mark or not, or whether it bears writing by which the voter can be identified or not.
- (iii) the failure to comply with s. 46 of the Ordinance had been shewn to have affected the result of the election but since the defects in the conduct of the election had affected both candidates, to declare the petitioner elected would

be, in the circumstances, clearly wrong; neither the second respondent nor any other person was duly elected, and the election was void.

Certificate to be issued accordingly.

Case referred to:

(1) *South Newington Municipal Election Petition*, [1948] 2 All E.R. 503.

Judgment

Sir Audley McKisack CJ: The petitioner, Mr. A. A. Ojera, was the unsuccessful candidate in the South West Acholi Electoral District at the general election for the Uganda Legislative Council held on March 24, 1961. The first respondent is the returning officer, and the second respondent is the successful candidate, Mr. A. A. Banya. In r. 2 (2) of the Election Petitions Directions, 1958, it is provided that, if the petition complains of the conduct of a returning officer, he shall be deemed to be a respondent.

Mr. Banya was elected with a majority of 52 votes. The votes cast for him totalled 7,150, and those for Mr. Ojera, 7,098. It is common ground that a substantial number of the ballot papers included in these totals did not comply with the provisions of the Legislative Council (Elections) Ordinance, 1957. Of Mr. Banya's total—

806 ballot papers were not perforated or stamped with an official mark [as required by s. 38 (1) (b) (i)].

33 lacked an official mark and also had figures written on them in pencil.

566 had figures pencilled on them.

All these figures were the numbers assigned to electors in the electoral register and could thus enable the electors to whom the ballot papers had been issued to be identified. These numbers should, of course, have been written on the counterfoils of the ballot papers and not on the ballot papers themselves [s. 38 (1) (b) (iii)]. Thus there were 1,405 of the votes given for Mr. Banya that contravened the provisions of the Ordinance. Of Mr. Ojera's total:

623 ballot papers lacked an official mark.

53 lacked an official mark and also had figures written on them in pencil.

447 had figures pencilled on them.

All these figures were the numbers assigned to electors in the electoral register the total of Mr. Ojera's defective ballot papers were thus 1,123.

Section 46 of the Legislative Council (Elections) Ordinance, 1957, contains the following provisions with regard to the returning officer's duties in respect of ballot papers lacking an official mark or bearing writings whereby a voter could be identified:

“46(1) The returning officer shall reject as invalid any ballot paper which is not stamped or perforated with the official mark or on which anything is written or marked by which the voter can be identified except the printed number.

“(2) Before rejecting a ballot paper, the returning officer shall show it to each candidate or his counting agent if present, and hear his views thereon, taking all proper precautions to prevent any person from seeing the number printed on the back of the paper.

“(3) The decision of the returning officer whether or not any ballot paper shall be rejected shall be final and shall not be questioned on an election petition.”

At the counting of votes for the South West Acholi Electoral District, when it became apparent that a large number of ballot papers were unstamped or bore writings, the returning officer consulted the candidates on the question whether these papers should be rejected. It is not disputed that these defects were due to mistakes on the part of the presiding officers or polling assistants at certain polling stations; that the mistakes were honest ones due to a misunderstanding of instructions; and that the voters themselves were in no wise to blame for the defects.

According to the evidence of the returning officer, Mr. Twining, and Mr. Banya, both candidates agreed that the defective votes should not be rejected. According to Mr. Ojera, the returning officer overrode his (Mr. Ojera's) objection to these votes being accepted, but I prefer the evidence of Mr. Banya and Mr. Twining on this point.

I do not, however, take the same view as Mr. Twining concerning the extent of the discretion given to a returning officer by section 46. The provisions of sub-s. (1) are mandatory, and give the returning officer no power to accept a ballot paper which is in fact lacking the official stamp or bearing writings whereby a voter can be identified. It follows that the "decision" referred to in sub-s. (3) cannot be a decision to accept a ballot paper which is unstamped or bears writings of the kind specified. It can only be a decision on the question whether or not a ballot paper bears the official mark, or whether or not it bears writings by which the voter can be identified. It is on those questions that the returning officer's decision, under sub-s. (3), is final and cannot be questioned on an election petition. I think this is the only construction of the section by which sub-s. (1) and sub-s. (3) can be reconciled.

In the present case it was not open to question that the ballot papers with which we are concerned had no official mark and did bear writings by which the voters could be identified. Consequently the returning officer had no option but to reject them after showing them to the candidates. Even though the candidates wished them to be accepted, it was a contravention of s. 46 (1) for the returning officer to accede to their wishes.

From the figures which I have given, it will be seen that the defective votes given for the successful candidate, Mr. Banya, exceeded those given for Mr. Ojera by 282. So that, if all these votes had been rejected, Mr. Ojera would have been elected by a majority of 230. Mr. Ojera's petition, however, does not expressly claim the seat for himself. After setting out the numbers of the defective votes the petition concludes as follows:

5. And your petitioner states that such a wholesale acceptance of otherwise void ballot papers under s. 46 (1) was unlawful, s. 46 (3) notwithstanding. Wherefore your humble petitioner prays:

(i) That it may be determined that the said Anjelo A. Banya was not duly elected or returned and that his election and return were void; and a new election in the said electoral district be held; ref. s. 65 of the Ordinance.

and/or

(ii) It may be determined that a recount should be held of the valid ballot papers in compliance with the said s. 46 (1) of the Legislative Council (Elections) Ordinance, 1957.

Mr. Clerk, for the petitioner, says that the reference to a recount is to be construed as an implied claim for the seat. Section 65 sets out the reliefs which a petitioner may claim, and these do not include a recount. Mr. Clerk, however, says that by "recount" he meant a "scrutiny", and that one of the reliefs specified in s. 65 is—

(d) where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful

votes, a scrutiny.

For reasons which will appear, I do not find it necessary to decide whether the petition can be construed as claiming the seat for the petitioner, or, if the answer to that question is no, whether I would nevertheless have power to declare the unsuccessful candidate elected.

Section 60 (2) of the Ordinance sets out the grounds on which the court shall declare the election of a candidate to be declared void and includes the following ground:

- (b) non-compliance with the provisions of the Ordinance relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election.

Section 62 of the Ordinance, the purpose of which is not wholly clear to me, appears at least to emphasise that the election of a candidate is not to be declared void for non-compliance with the provisions of the Ordinance if the court is satisfied that the election was conducted in accordance with the principles laid down in the Ordinance and that the non-compliance did not affect the result of the election.

On one of the questions involved in these provisions, the question whether non-compliance affected the result of the election, there is no room for argument in relation to the present case. If the defective ballot papers had all been rejected, as required by s. 46, it would be Mr. Ojera, not Mr. Banya, who would have been elected. But I cannot declare Mr. Banya's election void unless I am also satisfied that the election was not conducted in accordance with "the principles laid down" in the Ordinance. What are those principles? I do not find any provisions which are expressly stated to be "principles", so that the term "laid down" cannot have been used by the draftsman in that sense. But it is easy enough to infer certain principles from various provisions in the Ordinance, and I think that the term "laid down" is to be construed in that sense. For example, from s. 8, which states that an elector registered as such in an electoral district shall be entitled to one vote to be cast in that district, one can infer the principle that a voter is to cast one vote only. And from s. 38 (1) (C), which requires a voter to record his vote "secretly", it is not difficult to infer the principle of the secrecy of the ballot.

In the instant case the provisions with which there has been a failure to comply are those of s. 46 (1), requiring the rejection of ballot papers lacking the official mark or bearing writings by which the voter can be identified. The latter part of this provision must, I think, derive from the principle that I have already referred to in relation to s. 38, viz., the secrecy of the ballot. By looking at the register of voters, a person could identify 599 of the electors who voted for Mr. Banya and 500 of those who voted for Mr. Banya and 500 of those who voted for Mr. Ojera. I have no hesitation in finding that the conduct of the election was not in accordance with a principle laid down in s. 46 (1).

I have also to decide whether any principle is laid down by the provision requiring the rejection of a ballot paper for want of an official mark. The requirement that a ballot paper shall be so marked is contained in s. 38 (1). The mark is to be made

"immediately before the presiding officer or a polling assistant delivers a ballot paper to any person".

The purpose, I think, must be to show that the paper has been duly issued to a voter by a proper authority and that it is not, for example, one which has been forged or has been unlawfully obtained or issued. I do not think that this provision can be said to lay down any "principle". And, even if I am wrong and some principle can be discerned, I am satisfied on the evidence adduced at the trial, that the ballot papers in question were not forged or unlawfully

obtained or (save for the want of the official mark) unlawfully issued. Consequently it has not been proved that, in the words of s. 60 (1) (b), "the election was not conducted in accordance with the principles laid down" in this provision. In so far, therefore, as the petition relies on the failure to reject ballot papers whose only defect was the lack of the official mark, the petition fails. But it succeeds as I have said, in respect of the papers which bore the voters' registration numbers, and, if those papers had been rejected instead of being counted as valid, Mr. Banya's majority of 52 would have been converted into a majority of 47 for Mr. Ojera. So the result of this trial is that the non-compliance with the requirement of s. 46 has been shewn to have affected the result of the election, and the election has been shewn to have been conducted otherwise than in accordance with the principle of secrecy laid down in the Ordinance.

It is true, of course, that this non-compliance was not the fault of any voter but due to a defect in the official machinery. Mr. Mukasa, for Mr. Banya, has referred me to the *South Newington Municipal Election Petition* (1), [1948] 2 All E.R. 503, in which Birkett, J. (as he then was) said—

"We think that, in a case where the voter is in no sense to blame, where he has intended to vote and has expressed his intention of voting in a particular way, and, so far as his part of the transaction is concerned, has done everything that he should, and the only defect raised as a matter of criticism of the ballot paper is some defect on the part of the official machinery by which the election is conducted, special consideration should (and, no doubt, would) be given, in order that the voter should not be disfranchised."

But the *South Newington* (1) case has really no relevance to the South West Acholi one. The facts were very different, and no statutory provisions equivalent to s. 60 and s. 62 of our Ordinance fell to be discussed. If the conduct of the election violated the principles of that Ordinance, it cannot make any difference that the voters were blameless.

It remains to decide whether the election as a whole is to be declared void, or whether the election of Mr. Banya should be declared void, and Mr. Ojera be declared to have been duly elected. Assuming (without deciding) that the terms of the petition do not preclude me from taking the latter course, I nevertheless consider that, for the following reasons, it is not open to me to do so. The defects in the conduct of the election applied to both candidates, and they were on a large scale. They have led to the disfranchising of a not inconsiderable proportion of the electors. If their votes had not been invalid, Mr. Banya would have been duly elected. For the court to declare Mr. Ojera to have been duly elected in such circumstances would clearly be wrong. Accordingly, under s. 66 of the Ordinance I shall certify to the Governor that neither Mr. Banya nor any other person was duly elected, and that the election was void. The result will be that a new election will have to be held.

Certificate to be issued accordingly.

For the petitioner:

AV Clerk

For the first respondent:

JM Long (Crown Counsel, Uganda)

For the second respondent:

ANK Mukasa

For the petitioner:

Advocates: *Mayanja, Clerk & Co*, Kampala

For the first respondent:

The Attorney-General, Uganda

For the second respondent:

Kiwanuka & Co, Kampala

Zainab Bint Abdulla Gulab and another v Kulsum Bint Abdul Khalek and another

[1961] 1 EA 487 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 19 July 1961
Case Number: 34/1961
Before: Sir Kenneth O'Connor P, Crawshaw and Newbold JJA
Appeal from: H.M. Supreme Court of Aden–Gillett, J

[1] *Mohamedan law – Gift – Validity – Gift made during lifetime of donor – Gift of house affected by purported deed of sale – No consideration passing – Deed registered – Validity of gift – Contract Ordinance (Cap. 30), s. 25 and s. 27 (A.) – Indian Contract Act, 1872, s. 25 – Evidence Ordinance (Cap. 58), s. 100 (A.) – Indian Evidence Act, 1872, s. 92 – Transfer of Property Ordinance (Cap. 154), s. 126 (A.).*

Editor's Summary

The appellants and the second respondent were the heirs according to Mohamedan law of one Gulab who died in 1959. The second respondent was Gulab's widow and the first respondent was her sister who had been brought up by Gulab and had been a member of his household for about twenty-five years. In 1957 the deceased executed a document which purported to be a deed of sale of his house in Aden to the first respondent for a consideration of Shs. 25,000/-. After the deceased's death, the appellants instituted proceedings against the respondents claiming that the sale to the first respondent was a sham, that she had never paid any consideration for the sale deed, that when Gulab executed it he was infirm in mind and body and that it was executed as a result of a fraudulent conspiracy between the respondents to deprive the heirs of their shares in Gulab's estate. The trial judge dismissed the suit and found *inter alia* that no financial consideration was given by the first respondent for the transfer of the property but that Gulab had transferred the property intending her to have and keep it; that no undue influence had been used and that the deceased had good reason to make the transfer out of affection and gratitude for care given to him by the first respondent. On appeal it was argued that the purported sale was without consideration and under s. 27 of the Contract Ordinance was void; that the respondents could not claim

that the transaction was a gift as they had not pleaded this; and that the transaction under s. 25 of the Contract Ordinance was unlawful in that the intention was to deprive the heirs of their rights in the estate.

Held –

- (i) the effect of s. 27 of the Contract Ordinance is that an agreement made without consideration is not enforceable at law except in specified circumstances, such as where the agreement is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between the parties standing in near relation to each other.
- (ii) the appellants had in their plaint pleaded an ostensible sale without consideration which was in fact intended to transfer the suit property by way of gift; this was what the trial judge found and it was open to the judge to do so upon the appellants' own pleadings.
- (iii) the transaction constituted in law a gift which was made by a Mohamedan during his lifetime when he was not in extremis.
- (iv) there was nothing unlawful in a Mohamedan owner of property disposing of that property by a gift made during his lifetime and when he was not in extremis or in fear or expectation of imminent death, provided that there is

a bona fide intention to make a gift, an acceptance express or implied and a sufficient delivery of possession.

- (v) the gift was not unlawful merely because it purported to be effected by a sham deed of sale stated to be for a consideration which the donor well knew would not be paid and which was not paid or because the disposition deprived the apparent heirs of their expectations.

Per Sir Kenneth O'Connor P: "Section 27 of the Aden Contract Ordinance would have no application to a completed transfer of property without consideration where no question of enforcing an agreement arose."

Appeal dismissed.

Cases referred to:

- (1) *Nisar Ahmad Khan v. Rahmat Begum* (1927), A.I.R. Oudh. 146.
- (2) *Tatia v. Babaji* (1896), 22 Bom. 176.
- (3) *Eshenchunder Singh v. Shamachurn Bhutto* (1866), 11 Moo. Ind. App. 7; 20 E.R. 3.
- (4) *Serajuddin Haldar v. Isab Haldar* (1921), 49 Cal. 161.
- (5) *Shaik Ibhrum v. Shaik Suleman* (1884), 9 Bom. 146.
- (6) *Sheikh Muhammad Mumtax Ahmad v. Zubaida Jan* (1889), 16 I.A. 205.

July 19. The following judgments were read by direction of the court:

Judgement

Sir Kenneth O'Connor P: This is an appeal from the Supreme Court of Aden. The appellants (plaintiffs in the suit) and the second respondent are the heirs according to Mohamedan law of Ismail Abdulla Gulab (hereinafter referred to as "the deceased") who died at Aden on August 10, 1959. The deceased during his lifetime owned a house in Aden. The second respondent is the widow of the deceased and the first respondent, Kulsum, is her sister. Kulsum is not an heir of the deceased; but was brought up from childhood by the deceased and lived with him and his wife (her sister) for about twenty-five years.

On August 19, 1957, the deceased executed a document which purported to be a deed of sale of the house in Aden to Kulsum. The deed recited the deceased's ownership of the house and Kulsum's agreement to buy it for Shs. 25,000/- and witnessed that in pursuance of the said agreement and in consideration of the sum of Shs. 25,000 paid by the buyer before the sub-registrar (the receipt of which was acknowledged) the deceased granted the house to Kulsum; and it was stated in the deed that the deceased thereby gave possession of the house to Kulsum and that she agreed to pay the quitrent and taxes of the premises. After the sale, which was registered on August 19, 1957, the deceased and his wife and Kulsum continued to live in the house as theretofore.

The appellants claimed that the alleged sale to Kulsum was a sham, that she never paid any money as consideration for the sale deed, that the deceased when he executed it was infirm in mind and body and that it was executed as a result of a fraudulent conspiracy between Kulsum and her sister to deprive the

heirs of the deceased of their legal shares in his estate, and they claimed a declaration that the sale deed was void, delivery of it up for cancellation, a declaration that the house was part of the estate of the deceased and costs. Paragraph 7 of the plaint reads:

- “7. The plaintiffs further submit that the deceased intended to transfer the suit-property by way of gift to said Kulsum, but on being advised that such a transfer might be challenged as being without consideration, and intended to defeat the rights of the lawful heirs, had made an ostensible

sale, wherein no consideration passed from the buyer to the seller. The alleged sale was much below the normal value of the suit property.”

The value of the house was said to be about Shs. 50,000/-.

The respondents denied that the transaction was bogus or that the deceased was infirm and they denied the alleged conspiracy. They averred that Kulsum in fact paid Shs. 25,000/- for the house and denied that the deceased wanted to transfer the house by way of gift to her.

The appellants filed a rejoinder in which they joined issue with the respondents on their defence and maintained that the alleged sale was bogus.

The learned judge framed four issues as follows:

- “1. Was the conveyance made without consideration?
- “2. Was the conveyance made with intent to deprive the heirs of the deceased of their inheritance?
- “3. Did the two defendants prevail upon the deceased and obtain execution of the conveyance by undue influence?
- “4. To what relief, if any, are the plaintiffs entitled?”

He found that Kulsum had lived with the deceased from a very early age and that he treated her as a daughter. He found that the deceased had suffered from heart trouble of long standing and eye trouble; but that he was mentally sound in August, 1957, and that when he transferred the house to Kulsum, he was in no immediate fear of expectation of death. A witness, one Suleman Ahmed, who was the Sirdar of the Jamad to which the deceased belonged, impressed the learned judge as a truthful witness. He stated that about three years ago when the deceased was sick, he wanted to settle about the house; the deceased had said that he wished to transfer the house into the name of the girl who was with him, he wanted the building transferred during his lifetime, so that after his death there might be no quarrel with his relatives: the deceased had said that the girl had looked after him and he wanted to transfer the house to her name: he had not said that he wished to sell the house.

The learned judge found on the first issue, that no financial consideration was given by Kulsum for the transfer of the property. On the second issue he found that the deceased had transferred the property to Kulsum intending her to have and keep it; but that there was nothing unlawful about that. He quoted authority for the proposition that a Mohamedan owner has absolute dominion over property in his possession and can sell or dispose of it in any way he likes, provided operation is given to the disposition during his lifetime: it is only with regard to dispositions intended to take effect after the donor’s death or made in extremis that his power of disposition is limited by the rights of his heirs. On the third issue the learned judge found that the respondents did not cause the deceased to make the transfer by undue influence and that the deceased had good reason to make the transfer out of affection and gratitude for care given to him by Kulsum. The learned judge concluded his judgment as follows:

“On the facts as I have found them the position is briefly that Ismail during his lifetime sought to transfer the suit property to Kulsum out of natural affection and gratitude. For reasons which are not clear he purported to do this by means of a sham sale for Shs. 25,000/-. No consideration in fact passed from Kulsum for this sale. Ismail and Kulsum continued to reside in the suit property with Hajra (defendant 2) until Ismail’s death. Kulsum has not pleaded that the transfer was a gift and under cross-examination she has expressly denied on oath that it was a gift.

“I find that property in the house has passed to Kulsum even though she has not paid money for it. The transfer was effected by a registered document signed by the donor and attested by two witnesses.

“For these reasons this suit is dismissed with costs to defendant.”

Mr. Sanghani, for the appellants, argued that the purported sale was without consideration and that in Aden a sale without consideration was void and would not pass the ownership of the property. He relied on s. 27 of the Contract Ordinance (Cap. 30 of the Laws of Aden) which is similar to s. 25 of the Indian Contract Act, although there is one important difference, namely that whereas in India an agreement without consideration is (with certain exceptions) expressed to be void, in Aden it is expressed to be not enforceable at law. He conceded that the deceased could have made a valid gift of the property during his lifetime; but contended that the respondents could not be heard to allege that the transaction was a gift, as a gift had not been pleaded and the learned judge had not found that the transaction was a gift. And he said that even if the transaction was a gift, it was made while the deceased was in extremis following a severe heart attack and was, therefore, invalid.

As already stated, the effect of s. 27 of the Contract Ordinance, upon which Mr. Sanghani relied, is that an agreement made without consideration is not enforceable at law except in specified circumstances, one of which is where the agreement is expressed in writing and registered under the law for the time being in force for the registration of documents and is made on account of natural love and affection between the parties standing in a near relation to each other. It has been held in India under the corresponding section of the Indian Contract Act that a Muslim's wife's parents stand in near relation to her husband: *Nisar Ahmad Khan v. Rahmat Begum* (1) (1927), A.I.R. Oudh. 146, cited in Pollock and Mulla on the Indian Contract Act (8th Edn.) at p. 204. It is clear, therefore, that the parties need not be blood relations in order to make this exception applicable. There seems to be considerable doubt whether s. 25 of the Indian Contract Act, which applies to agreements, would be applied in the mufassal in India so as to avoid a completed transfer made without consideration. (See *Tatia v. Babaji* (2) (1896), 22 Bom. 176, cited at p. 210 of Pollock and Mulla.) In my opinion, s. 27 of the Aden Contract Ordinance would have no application to a completed transfer of property without consideration where no question of enforcing an agreement arose. But even if I am wrong on this, I think that the transaction in the present case might well be held to fall within the exception which I have mentioned. I find it unnecessary, however, to decide this point as I think that the transaction was valid as a gift by a Mohamedan made during his lifetime.

Mr. Sanghani, as already stated, argued that the appellants could not be heard to say that the transaction was a gift as they had not pleaded this and Kulsum had denied it, and he cited the well-known words of Lord Westbury in *Eshenchunder Singh v. Shamachurn Bhutto* (3) (1866), 11 Moo. Ind. App. 7, 20 E.R. 3, upon the necessity of a determination being founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. But the plaintiffs themselves, in para. 7 of the plaint above quoted, pleaded an ostensible sale without consideration which was in fact intended to transfer the suit property by way of gift. That was what the learned judge found to have occurred and it was entirely open to him to do so upon the plaintiffs' own pleading. The legal effect of that finding is a matter which it is open to us to determine. It is not correct, as Mr. Sanghani suggested, that a deed of sale cannot be treated as a deed of gift because the document recites a consideration which was not in fact given, and s. 100 of the Evidence Ordinance (Cap. 58 of the Laws of Aden), corresponding to s. 92 of the Indian Evidence Act, does not prevent evidence being adduced to show that no money was in

fact paid: *Serajuddin Haldar v. Isab Haldar* (4) (1921), 49 Cal. 161, 165; and proviso (a) to s. 100 (1) of the Evidence Ordinance.

In my opinion, the transaction which was pleaded in para. 7 of the plaint and which the learned judge found to have taken place constituted in law a gift of the suit property by the deceased, who was admittedly a Mohamedan, made during his lifetime, which would be valid under Mohamedan law: Mulla's Principles of Mohamedan Law (13th Edn.), p. 134, Art. 142. Where donor and donee both reside in the property, no physical departure or formal entry is necessary: *Shaik Ibhrum v. Shaik Suleman* (5) (1884), 9 Bom. 146. And a declaration in a deed of gift that possession has been given binds the heirs of the donor: Mulla, p. 139: *Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan* (6) (1889), 16 I.A. 205. As already stated, the document in this case may be treated as a deed of gift. By s. 126 of the Transfer of Property Ordinance (Cap. 154 of the Laws of Aden) nothing in Part VI of that Ordinance affects the rules of Mohamedan law relating to gifts. The deceased when he made the gift to Kulsum was not in extremis, since he lived for a further two years, and I agree with the learned judge's finding that he was not then in immediate fear or expectation of death.

Mr. Sanghani relied also on s. 25 of the Contract Ordinance and said that the transaction was void as being unlawful, in that the intention was to deprive the heirs of their rights in the estate of the deceased. I see nothing unlawful in the Mohamedan owner of property disposing of that property by a gift made two years before his death and when he was not in extremis or in fear or expectation of imminent death, provided that there is a bona fide intention to make a gift, an acceptance express or implied and a sufficient delivery of possession. I think that all these circumstances obtained here and that the transaction was not unlawful merely by reason of the fact that it purported to be effected by a sham deed of sale stated to be for a consideration which the donor well knew would not be paid and which was not paid. It would certainly not be unlawful merely because the disposition deprived the apparent heirs of their expectations. I agree also with the learned judge's finding that the respondents did not cause Ismail to make the transfer by undue influence. I would dismiss the appeal with costs.

There was a cross-appeal in the following terms:

"The lower court, having held that the deceased, Ismail Abdulla Gulab, was (a) *compos mentis*, (b) legally competent to dispose of his property *inter vivos* in any way he liked, ought further to have held that the transfer made in favour of the first defendant was legally valid and effectual against the plaintiffs even if the said transfer was accompanied by the intention to deprive the plaintiffs of their rights of inheritance."

In my opinion, the finding which the cross-appeal averred that the learned judge ought to have made was the finding which he had made. This was an entirely unnecessary cross-appeal and I would strike it out. The costs of perusing it should be the appellants' (it did not add anything appreciable to the hearing time); and no other costs of it (as opposed to the costs of the appeal) should be charged by the respondents' advocate to his clients.

Crawshaw JA: I agree and having nothing to add.

Newbold JA: I also agree.

Appeal dismissed.

For the appellants:

PK Sanghani

For the respondents:

SN Iyer

For the appellants:

Advocates: *PK Sanghani*, Aden

For the respondents:

SN Iyer, Aden

Thomas James Arthur v Nyeri Electricity Undertaking
[1961] 1 EA 492 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 August 1961
Case Number:	9/1961
Before:	Sir Alastair Forbes V-P, Sir Trevor Gould JA and Mayers J
Appeal from:	H.M. Supreme Court of Kenya–Pelly Murphy, J

[1] Costs – Taxation – Instructions fee – Amount allowed four times the scale fee – On reference to judge amount reduced as manifestly excessive – Appeal to the Court of Appeal – When interference with taxing officer’s decision justified – Remuneration of Advocates Order, 1955, s. 10 and s. 11 (K.).

Editor’s Summary

In an action in which the plaintiff was awarded substantial damages the taxing officer allowed the successful plaintiff an instructions fee of Shs. 8,000/-. The defendant referred the matter to the decision of a judge of the Supreme Court who reduced the fee to Shs. 4,000/- on the ground that the fee allowed which was quadruple the scale fee was so manifestly excessive as to be of itself indicative of the exercise of a wrong principle. On appeal,

Held –

- (i) where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will intervene only in exceptional cases.
- (ii) the fee allowed was higher than seemed appropriate, but in a matter which must remain essentially one of opinion, it was not so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle.

Appeal allowed. Decision of the taxing officer restored.

Cases referred to:

- (1) *In the Estate of Ogilvie: Ogilvie v. Massey*, [1910] P. 243.
- (2) *Theocharides v. Joannou*, [1955] 1 All E.R. 615.
- (3) *Taj Deen v. Dobrosklonsky and Others*, [1957] E.A. 379 (C.A.).
- (4) *Haider Bin Mohamed Elmandry and Others v. Khadija Binti Ali Bin Salem* (1956), 23 E.A.C.A. 313.
- (5) *D'Souza v. Ferrao*, [1960] E.A. 602 (C.A.).
- (6) *Puran Singh v. Bishen Singh Chadah*, [1957] E.A. 610 (C.A.).

Judgement

Gould JA: read the following judgment of the court: In an action in which the appellant (plaintiff) was successful the taxing officer fixed the instructions fee in the bill of costs at Shs. 8,000/-. The matter went before a judge of the Supreme Court on review and he reduced the fee to Shs. 4,000/-. From that order the appellant appealed by leave to this court under s. 11 of the Remuneration of Advocates Order, 1955.

The principles which are applied by judges upon review of taxing officers' certificates are well known, and of the authorities quoted by counsel I need do no more than mention *In the Estate of Ogilvie: Ogilvie v. Massey* (1), [1910] P. 243, *Theocharides v. Joannou* (2), [1955] 1 All E.R. 615 and *Taj Deen v. Dobrosklonsky and Others* (3), [1957] E.A. 379 (C.A.). Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to

deal and the court will intervene only in exceptional cases. An example of such an exceptional case is that of *Haider Bin Mohamed Elmandry and Others v. Khadija Binti Ali Bin Salem* (4) (1956), 23 E.A.C.A. 313, in which an instructions fee of Shs. 9,000/- was considered so excessive

“as to indicate that it must have been arrived at unjudicially or on erroneous principles”,

and was reduced to Shs. 2,000/-. Counsel for the respondent in the present case submitted that the English authorities should not apply with full force in Kenya, as they are based on the very great experience of most of the English taxing masters and that was a factor which did not invariably apply in this territory. We do not consider this argument to be acceptable as a general proposition, and it is certainly not one which could in any event avail the respondent in the present case, as it was agreed by counsel that the particular taxing officer concerned was an officer of substantial experience.

In the present case the action in respect of which the bill of costs was taxed was one for personal injury during the course of employment. It had the unusual feature that the appellant had been injured upon two separate occasions and both causes of action were included in the same plaint. The claim was founded on negligence with various alternatives, including breach of statutory duty. There were substantial, though not exceptionally difficult, issues of law, and the case occupied five days. The total damages assessed by the learned trial judge amounted to Shs. 100,446/- but as a result of a finding of contributory negligence on the part of the appellant in one accident the amount of the judgment was reduced to Shs. 73,162/03.

In the Schedule VI of the Remuneration of Advocates Order, 1955, it is provided that the instructions fee shall be such sum as the taxing officer may, in his discretion, decide, and, unless there be good cause for increasing or reducing the amount, shall be in accordance with a scale set out. The scale fee where “the value of the subject matter” is between Shs. 20,000/- and Shs. 100,000/- is Shs. 2,000/-, and where it is between Shs. 100,000/- and Shs. 200,000/- it is Shs. 4,000/-.

The taxing officer treated the appropriate scale fee as Shs. 2,000/- and gave his reasons for deciding that an increased fee was proper. In his Order on the review the learned judge said:

“On these facts it cannot be said that the taxing officer erred in principle in finding good cause to increase the scale fee. But in my opinion an increase which quadruples the scale fee is, in any but the most exceptional case, completely unjustified. This was not an exceptionally difficult case and none of the reasons advanced by Mrs. Kean for suggesting that it was convinced me.

“I am of the opinion that the amount allowed by the taxing officer for the instructions fee is so manifestly excessive as to be of itself indicative of the exercise of a wrong principle. I reduce the fee to one of Shs. 4,000/-.”

We agree that the fee allowed was higher than seems to us appropriate, but in a matter which must remain essentially one of opinion, we think, with respect, that it was not so manifestly excessive as to justify the learned judge in treating it as indicative of the exercise of a wrong principle. Counsel for the respondent submitted that the scale of fees was intended to assist in securing uniformity of practice, and stressed the public importance of keeping legal costs within reasonable limits. With both submissions we agree, but we do not find them so cogent as to alter our view that the present case is not one of those exceptional cases where the court can interfere on a question of quantum. Though the taxing officer accepted that the appropriate scale fee was

Shs. 2,000/-, we do not think that it could have been made a matter of complaint if he had regarded the subject matter of the action as exceeding Shs. 100,000/- in value, in which case the scale fee would have been Shs. 4,000/-. Under Schedule VI the scale applies where the value of the subject matter can be determined “from the pleadings or the judgment”. The value is not necessarily to be determined by the amount recovered, and in the present case the judgment showed that the total of the damages, all of which were in issue, exceeded Shs. 100,000/-. We do not consider that very much turns on this, as a taxing officer, when he has decided that the scale should be exceeded, does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved. Nevertheless, had this aspect of the matter been placed before the learned judge it might have affected his opinion.

For the reasons we have given we allowed the appeal at the conclusion of the hearing, set aside the order of the learned judge and restored the ruling of the taxing officer—the appellant to have the costs of the reference to the judge and of the appeal.

There are one or two other matters upon which, in view of our decision, nothing turns but which call for mention. Counsel for the appellant informed the court that the learned judge’s reference to quadrupling the scale fee in the passage from the Order set out above, was being interpreted by taxing officers as placing something in the nature of a ceiling upon their discretion. We are confident that the learned judge had no such intention; he was considering the case before him, and it would be quite wrong to construe what he said as fettering the discretion of taxing officers in the great variety of cases and circumstances with which they have to deal.

The next matter arises from a submission by counsel for the appellant that the learned judge had no power to fix the instructions fee himself, but only to remit the matter to another, or the same, taxing officer. We do not agree. As this court pointed out in *D’Souza v. Ferrao* (5), [1960] E.A. 602 (C.A.) it is general practice in England, where there has been an error of principle, to remit the resulting question of quantum to a taxing master for decision, and that practice ought normally to be followed in Kenya. That is far from saying that the judge has no jurisdiction to deal with the matter himself. *Theocharides v. Joannou* (2), and *Puran Singh v. Bishen Singh Chadah* (6), [1957] E.A. 610 (C.A.) are cases in point. Section 10 of the Remuneration of Advocates Order, 1955, under which the reference to a judge is made, provides that the objection to the decision of the taxing officer is to be referred “for the decision of a judge”, which must imply power in the judge to make such order as he may deem necessary to rectify the error, if he finds one has been made.

Appeal allowed. Decision of the taxing officer restored.

For the appellant:

M Kean

For the respondent:

AE Hunter

For the appellant:

Advocates: *Sirely & Kean*, Nairobi

For the respondent:

Wanjunji s/o Karioki v R
[1961] 1 EA 495 (SCK)

Division: HM Supreme Court of Kenya at Nairobi
Date of judgment: 25 September 1961
Case Number: 753/1961
Before: Rudd and MacDuff JJ

[1] Trespass – Farm – Former employee forbidden to visit farm – Visit to farm at night – Arrest by headman on manager’s instructions – Whether arrest lawful – Trespass Ordinance (Cap. 166), s. 3, s. 4 and s. 6 (K.).

Editor’s Summary

The appellant who had been employed on a farm was discharged and told not to visit the farm without permission. The farm manager also gave instructions that if found on the farm the appellant should be arrested. The night watchman of the farm saw the appellant at about 2 a.m. at the house which he had previously occupied on the farm and in which his father lived. He reported this to the headman who went with the watchman to arrest the appellant. As the headman entered the house the appellant tried to escape, drew a knife and cut the headman on the arm. He then ran away but was subsequently arrested. He was charged with trespass on a farm contrary to s. 3 of the Trespass Ordinance and with assault with intent to resist arrest. He was acquitted of trespass and convicted of assault with intent to resist arrest and sentenced to six months’ imprisonment. From this conviction and sentence he appealed. By s. 6 (1) of the Trespass Ordinance any person who is in a hut or enclosed premises on private land between 6 p.m. and 6 a.m. without the consent of the owner of the land is guilty of an offence and may be arrested by, *inter alia*, the owner. The section contains no express power of delegation of the owner’s power of arrest but s. 2 defines “owner” as including the occupier and person in charge of or having the supervision of any lands. The material issue at the hearing of the appeal was whether or not the attempted arrest by the headman and night watchman was lawful.

Held –

- (i) a night watchman, headman or foreman entrusted with the care and supervision of any part of a farm, and instructed to exercise supervisory powers to prevent trespass, comes within the meaning of “owner” and can exercise an owner’s power of arrest.
- (ii) the sentence was not excessive in the circumstances.

Appeal dismissed.

No cases referred to in judgment

Judgment

Rudd J: read the following judgment of the court: The appellant appeals from conviction and sentence of six months' imprisonment for assault with intent to resist his lawful arrest.

The factual background of the case was that prior to the events in question the appellant had been employed on a certain farm and had lived in a house on the farm, but he was discharged from that employment and told not to visit the farm without authority after he had served a sentence of three months' imprisonment in respect of a conviction for an assault upon the farm manager. The appellant did subsequently visit the farm and the manager gave instructions that he should be arrested if he was found on the farm.

Turning now to the more immediate facts; the night watchman saw the appellant at about 2 a.m. at the house which he had previously occupied on the farm. The watchman reported this to the headman who went with the

watchman to arrest the appellant between 7 and 8 o'clock on the morning in question. They found the appellant in a house on the farm which was occupied by the appellant's father. The headman entered this house to arrest the appellant, who drew a knife against the headman and cut him on the arm as he was trying to get out of the house. The appellant then rushed from the house, brandishing the knife and a panga, tripped on a wire outside the house and was arrested.

He was charged with trespass on a farm contrary to s. 3 of the Trespass Ordinance and with assault with intent to resist arrest. He was acquitted of trespass and convicted of assault with intent to resist arrest.

Although the acquittal on the charge of trespass is not in question on this appeal we think that we should advert to it for the future guidance of the magistrate, who held that to visit one's immediate family is a reasonable excuse for visiting a farm labour camp even against the orders of the owner of the farm. In our opinion this proposition is much too widely stated and is not correct in law. We would point out that under s. 4 of the Ordinance any person who is in any hut, enclosed premises, yard or compound on any privately owned land between the hours of 6 p.m. and 6 a.m. without the consent of the owner of the said land is guilty of an offence under the Ordinance. It would be a good defence to a charge under this section if the trespasser proves that the consent of the owner was unreasonably refused or that he had reasonable grounds for not obtaining such consent. Although the appellant was not charged under s. 4 the provisions of that section can, and should, so far as facts allow be taken into consideration on a charge of an offence under s. 3 of the Ordinance. Apart from this question, however, we think the magistrate's direction was not correct in law even as regards trespass in the daytime.

Turning now to the point at issue on the appeal, we think that the only material question in issue is whether or not the attempted arrest by the headman and night watchman was lawful. The powers of arrest under the Ordinance are provided by s. 6 (1), which reads as follows:

"6.(1) When any person is seen or found committing or is reasonably suspected of having committed an offence under this Ordinance, the owner of the cultivated, enclosed or private lands or the owner of the fence, as the case may be, or any police officer may arrest such person without warrant if he has reason to believe that, except by arresting him, he may not afterwards be found without undue delay, trouble or expense."

Under this section power of arrest is given to the owner or any police officer. No express power of delegation of the owner's power of arrest appears in this sub-section. However, s. 2 of the Ordinance defines "owner" as including the occupier and person in charge of or having the supervision of any lands or fence.

In effect, therefore, an owner in the ordinary sense of the word virtually delegates his power of arrest under the Ordinance to any person to whom he entrusts the care or supervision of any part of his farm or fence.

In our opinion a night watchman, headman or foreman entrusted with the care and supervision of any part of the farm and instructed to exercise supervisory powers to prevent trespass comes within the meaning of "owner" and can exercise an owner's power of arrest. The sentence is not excessive in the circumstances. The appeal is dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the Crown:

F Mallon (Crown Counsel, Kenya)

For the respondent:

The Attorney-General, Kenya

Mohanlal Lalji Thakrar v Pirbhai Lalji & Sons Limited

[1961] 1 EA 497 (HCU)

Division: HM High Court of Uganda at Jinja

Date of judgment: 31 July 1961

Case Number: 52/1960

Before: Keatinge J

[1] Rent restriction – Premium – Recovery of premium paid by tenant – Premises comprising shops and dwellings – Mixed premises – Dominant user – Agreement to lease for term exceeding seven years – Whether parties in pari delicto – Whether premium recoverable – Rent Restriction Ordinance (Cap. 115), s. 3 (2) (U.) – Evidence Ordinance (Cap. 9), s. 113 (U.) – Indian Evidence Act, 1872, s. 115.

Editor's Summary

The plaintiff, who carried on a business at Jinja which he wished to extend, approached a director of the defendant company, which was then constructing a building at Pallisa comprising five shops and two residences, with a view to renting part of the premises. The negotiations led to an agreement dated April 24, 1954, by which the plaintiff agreed to pay a premium of Shs. 10,000/- and a monthly rent of Shs. 625/- for a tenancy of three of the shops and one of the residences for seven years and three months. No formal lease or instrument was prepared and registered pursuant to this agreement. Later the premises were sold and in May, 1955, the plaintiff entered into a new agreement with the purchaser. The plaintiff subsequently sued the defendant company for the recovery of the premium on the ground that although the payment was illegal the plaintiff was not in *pari delicto* with the defendant company. It was not disputed by the defendant company that the premium was paid but it was submitted that the premises were let for business purposes and were thus premises within the meaning of the Rent Restriction Ordinance; that the word “lease” in the proviso to s. 3 (2) of the Ordinance should be construed as “letting”; that the premium was not recoverable as the parties were in *pari delicto* and that by cl. 5 of the agreement the plaintiff was estopped from raising the issue of illegality.

Held –

- (i) since the premises comprised shops and a dwelling-house they were “mixed premises” and it must be ascertained into which category, of business or residential premises, the property should fall. *Harnam Singh v. Jamal Pirbhai*, [1951] A.C. 688 followed.
- (ii) although there was nothing in the agreement to indicate the purpose of the letting the plans

indicated that the building was primarily constructed for shops and since the plaintiff's primary purpose in renting the premises was to obtain the use of the shops, the premises were let for business purposes and constituted "premises" within the meaning of the Rent Restriction Ordinance. *Narandas Jina v. Mohamed Amin*, [1959] E.A. 728 (T.) followed.

- (iii) there was no justification for construing the word "lease" in s. 3 (2) of the Rent Restriction Ordinance as "letting".
- (iv) in accepting a premium the defendant company as landlord had failed to observe the law and since the appellant as tenant was one of a protected class he was not in pari delicto with the landlord. *Kiriri Cotton Co. Ltd. v. Dewani*, [1960] 1 All E.R. 177; [1960] E.A. 188 (P.C.) followed.
- (v) as the payment of the premium was an unlawful transaction the plaintiff was not estopped from raising the issue of illegality.

Judgment for the plaintiff.

Cases referred to:

- (1) *Harnam Singh v. Jamal Pirbhai*, [1951] A.C. 688.
- (2) *Narandas Jina v. Mohamed Amin*, [1959] E.A. 728 (T.).
- (3) *Kampala Cotton Co. Ltd. v. Pravinlal V. Madhvani* (1954), 21 E.A.C.A. 129.
- (4) *Uganda Ration Stores and Others v. Pyarali Bandali and Others* (1955), 22 E.A.C.A. 286.
- (5) *Kiriri Cotton Co. Ltd. v. Dewani*, [1960] 1 All E.R. 177; [1960] E.A. 188 (P.C.).

Judgment

Keatinge J: The plaintiff's claim is for Shs. 10,000/-. The undisputed facts are as follows:

The plaintiff, who is a businessman and at the relevant time had a business and residence in Jinja, at the beginning of 1954 wished to extend his business to Pallisa. At that time there was a shortage of shops and residences at Pallisa. The defendant, who was in business at Pallisa, was at that time erecting a building which comprised five shops and two residences. One of the residences was at the rear of three of the shops and the other residence was at the rear of the remaining two shops. Plaintiff approached one Abdulali Pirbhai Lalji, who was a director of the defendant company (for convenience hereinafter referred to as defendant) with a view to renting part of the new premises when they were ready for occupation. The negotiations between the parties resulted in a written agreement dated April 24, 1954 (exhibit 1). The plaintiff rented three shops and one residence for a period of seven years and three months. Plaintiff was to pay a monthly rent of Shs. 625/- and also to pay Shs. 10,000/- as goodwill or premium. Later the premises were sold by the defendant to one Laljibhai Jivan and in May, 1955, a new agreement (exhibit 1A) which was drawn up by defendant was entered into by plaintiff and Laljibhai Jivan. It is not disputed that the premium of Shs. 10,000/- was in fact paid and it is not disputed that no formal lease or instrument was drawn up and registered as a result of the agreement to let (exhibit 1).

Paragraph 6 of the plaint is in the following terms:

- "6. By virtue of the provisions of sub-s. (2) of s. 3 of the Rent Restriction Ordinance (Cap. 115) the receipt of the said sum of Shs. 10,000/- by the defendant from the plaintiff was illegal but the plaintiff is entitled to recover the same since he was not in *pari delicto* with the defendant."

Sub-section (2) of s. 3 and second proviso thereto are as follows:

- "(2) any person whether the owner of the property or not who in consideration of the letting or sub-letting of a dwelling-house or premises to a person asks for, solicits or receives any sum of money other than rent or any thing of value whether such asking, soliciting or receiving is made before or after the grant of a tenancy shall be guilty of an offence and liable to a fine not exceeding Shs. 10,000/- or imprisonment not exceeding six months or to both such fine and imprisonment:"

"And provided further that nothing in this section shall be deemed to make unlawful the charging of a purchase price or premium on the sale, grant, assignment or renewal of a long lease of premises where the term or unexpired term is seven years or more."

The above proviso has since been amended but so far as this case is concerned the original proviso as set out applies.

Mr. Phadke, who appeared for the defendant, has submitted four propositions viz:

1. That the suit premises were let for business purposes and thus are “premises” within the meaning of the Rent Restriction Ordinance.
2. The word “lease” used in the proviso should not be construed in its technical meaning but should be read as “letting”.
3. In the alternative that the premium is not recoverable as the parties were in *pari delicto*.
4. That by reason of cl. 5 of the agreement between the parties (exhibit 1) and to a certain extent repeated in the agreement (exhibit 1A), plaintiff is estopped from raising the question of illegality.

“Premises” is defined in s. 2 of the Rent Restriction Ordinance as follows:

“premises” means any building or part of a building let for business, trade, or professional purposes or for the public service, but shall not include any land other than the site of the premises or land within the curtilage of the premises;”

The suit premises in this case, as already mentioned, comprise shops and a “dwelling-house” within the meaning of the Rent Restriction Ordinance. Thus these premises can be described as “mixed premises”. It was held by the Privy Council in *Harnam Singh v. Jamal Pirbhai* (1), [1951] A.C. 688; that in the case of “mixed premises” which have some connection with both descriptions it must be ascertained to which of the two categories such property ought the more appropriately to be ascribed. And at p. 703 in the judgment it was stated:

“It becomes necessary to decide, therefore, whether the premises are a dwelling-house or business premises . . . Since the statutory scheme requires a choice between the two categories of property it is unavoidable that some test such as that of dominant feature or user should be applied.”

Only the plaintiff and defendant have given evidence. Plaintiff says that his purpose in renting the premises was to extend his business which he was already carrying on at Jinja. There is some evidence to the effect that at times the plaintiff did not reside on the premises but one of his brothers resided there when such brother was carrying on the Pallisa business. Defendant agrees in his evidence that plaintiff wanted to start business at Pallisa.

There is no express provision in the agreement (exhibit 1) as to the purpose of the letting. It was held in *Narandas Jina v. Mohamed Amin* (2), [1959] E.A. 728 (T.); that in these circumstances it is open to the court to look at the construction of the building; if the building is constructed for use as a dwelling-house the reasonable inference would be that it was so let; if constructed as a shop the reasonable inference would be that it was so let.

While I do not pretend to be an expert on reading plans, in my opinion the plan of the building (exhibit A) shows that it was primarily constructed to provide shops. Moreover, defendant in his evidence stated:

“We decided to put up the building because shops and residences were in short supply—particularly shops.”

It has been held that a dwelling-house with no business accommodation at all may be let “for business purposes”, *Re Kampala Cotton Co. Ltd. v. Pravinlal V. Madhvani* (3) (1954), 21 E.A.C.A. 129. In that case Briggs, J.A., as he then was, in the course of his judgment said at p. 134:

“that a separate building, in itself obviously a dwelling-house and used as such by the tenant’s employee, is nonetheless ‘let for business purposes’ if in fact it is let to the tenant and used by him as one of the features of his business operations.”

It is true that the tenant in that case was a limited company but although this plaintiff is an individual in my view to all practical purposes he is in much the same position as the company. In my judgment the plaintiff's purpose in renting the premises was to extend his business. He already had a residence in Jinja. I am quite satisfied that the plaintiff's primary purpose in renting the premises was to obtain the user of the shops; and the living accommodation was ancillary to that purpose. I find that these premises were let for business purposes and are in fact "premises" within the meaning of the Rent Restriction Ordinance.

As regards the second submission, that is the word "lease" as used in the proviso means letting, it is admitted that no lease or instrument has ever been drawn and registered. It has been submitted that the use of the word "long" before "lease" shows that the word lease is not to be construed in its technical sense. I am unable to agree as it seems to me that a lease for a term of seven years or more can fairly be described as a long lease. I think no particular significance can be given to the use of the word "long". It has been pointed out that in *Uganda Ration Stores and Others v. Pyarali Bandali and Others* (4) (1955), 22 E.A.C.A. 286; it was held that the words "to quit" in sub-s. (1) (L) of s. 6 of the Rent Restriction Ordinance were not used in their technical sense, but, in my opinion, the court came to this conclusion for reasons which do not apply to the use of the word "lease" in the proviso to sub-s. (2), s. 3. It seems to me that it would take strong argument to convince the court that the word "lease" was not used in the sense that it would ordinarily bear in the law of landlord and tenant. To give the word its ordinary literal interpretation neither negatives the object of the Ordinance nor results in absurdity or futility. In these circumstances I reject the submission that the word "lease" as used in the proviso means "letting".

In delivering the judgment of the court in *Kiriri Cotton Co. Ltd. v. Dewani* (5). [1960] 1 All E.R. 177; Lord Denning said at p. 182:

"The duty of observing the law is firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant and if the law is broken the landlord must take the primary responsibility".

The defendant in this case did not draw up and register a lease and in my judgment he is not covered by the proviso to sub-s. (2) of s. 3 of the Rent Restriction Ordinance. Thus in obtaining and accepting a premium he has failed to observe the law.

Thirdly, it is submitted that the premium paid is not recoverable as the parties were in *pari delicto*. The plaintiff in his evidence says that he only wanted one shop and one residence. As against this the defendant has said that plaintiff asked him to let three shops and one residence for a period of seven years. Later in his evidence defendant said that he wanted to get one tenant for the whole building. It is to be observed that in the agreement (exhibit 1) provision is made for sub-letting by plaintiff with the consent of the defendant. It even goes so far as to state that in the event of the plaintiff sub-letting he will be entitled to retain as his own property any goodwill which he may obtain from his sub-tenants. In my judgment the balance of probabilities is that the plaintiff did at first ask for one shop only and one residence but naturally, in the ordinary way of business, defendant refused this and would only let to him three shops and the residence attached to them.

There is also a conflict of evidence as to the cheque which plaintiff gave to defendant during the negotiations. Plaintiff says that although the premium was agreed at Shs. 10,000/- he gave a blank cheque to defendant to show his good faith, on which neither the date nor the amount was filled in. On the other hand the defendant says that the date only was left blank and that the amount had been filled in. I think it unlikely that a businessman would hand over a

cheque without filling in the agreed amount. On the balance of probabilities I accept the evidence of the defendant. It is clear that the plaintiff was most anxious to obtain the premises. He said in his evidence:

“I gave Abdulali the cheque because I wanted the premises very badly and I wanted to make sure I would get them.”

And defendant said:

“Mohanlal (plaintiff) was very keen and insisted that I should give these premises to him and nobody else.”

Having regard to the evidence in my opinion plaintiff was subjected to little or no pressure to pay the premium. Plaintiff was in the position of a rich tenant who paid a premium in order to make sure of obtaining the premises.

Nevertheless as a tenant he is a member of a protected class. Even though he may be an accomplice and an aider and abettor he can hardly be said to be in *pari delicto* with the landlord. As Lord Denning said at p. 182, *Kiriri Cotton Co. Ltd.* (5):

“Whether it be a rich tenant who pays a premium as a bribe in order to ‘jump the queue’, or a poor tenant who is at his wits’ end to find accommodation, neither is so much to blame as the landlord who is using his property rights so as to exploit those in need of a roof over their heads.”

While, in the circumstances, I have no great sympathy for this plaintiff, I think the court must hold that he was not in *pari delicto* with the defendant—his landlord.

Lastly I come to the issue of estoppel. Clause 5 of the agreement (exhibit 1) reads as follows:

“(5) If according to the law of rent control it becomes necessary to have an agreement in English prepared by a lawyer and to have it registered, you may do so and I agree to sign it. But whatever is agreed between us in this agreement is binding. Under any circumstances the sum of Shs. 10,000/-, in words ten thousand, which I have given you is your (that is to say the owner’s) absolute property. I have no right to ask for the return of the said sum. If after obtaining your consent, that is written consent, I sub-lease any shop to a sub-tenant, any goodwill obtained by me from him shall be my property.”

In my opinion it is clear from the above that if the plaintiff and defendant did not know that the payment of a premium was unlawful they at least thought that it might be. Later when the premises were sold to Laljibhai Jivan the agreement made between the plaintiff and Laljibhai Jivan stated *inter alia*:

“Further the goodwill paid to Messrs. Pirbhai Lalji & Sons Ltd., under agreement, in respect of all the shops and residential quarters on plot No. 15 and 17, block B, which were formerly leased by Messrs. Pirbhai Lalji & Sons Ltd., the former landlord, to the present tenants, shall remain the absolute property of Messrs. Pirbhai Lalji & Sons Ltd., the former landlord. The new landlord Laljibhai Jivan has no claim or connection with the amount of the said goodwill. Laljibhai Jivan is not to take goodwill from anyone.”

In my opinion cl. 5 amounts to an undertaking by the plaintiff that whatever the position might be in law he would take no action against defendant to recover the premium paid. The defendant in his evidence says:

“The object was to stop plaintiff from claiming the premium back. Paragraph 3 of Agreement Ac. 1A was put in for the same reason”.

It is now submitted that in view of these undertakings the plaintiff is estopped from raising the question of illegality.

Mr. Phadke has cited several English cases on estoppel but in my opinion these cases are of little assistance as the question of whether a party can be estopped from raising an illegal transaction did not arise. Our s. 113 of the Evidence Ordinance is identical to s. 115 of the Indian Evidence Act. In the Commentary on s. 115 in Woodroffe and Ameer Ali on the Law of Evidence Applicable to British India (9th Edn.), p. 831; it is stated:

“It is an absolutely fundamental limitation on the application of the doctrine of estoppel that it cannot be applied with the object or result of altering the law of the land. The law, for instance, imposes fetters upon the capacity of certain persons to incur legal obligations and particularly upon their contractual capacity. It invalidates and renders null and void certain transactions, on the ground that they are illegal. It attaches certain incidents to property as, for instance, by prescribing the mode in which it shall be transferred. This general law is in no way altered by the doctrine of estoppel. It is not allowed to enlarge the status or capacity of parties, nor to be a cloak for illegality; nor to alter the incidents of property. The admission exacted must always be of something which can legally be done by the party from whom it is exacted.”

The authorities on which the above commentary is based are not available here. However, as I consider the payment of the premium was an unlawful transaction in my judgment plaintiff is not estopped from raising the issue of illegality.

For these reasons judgment will be entered for plaintiff for Shs. 10,000/- with costs and interest.

Judgment for the plaintiff.

For the plaintiff:

AI James

For the defendant:

YV Phadke

For the plaintiff:

Advocates: *Hunter & Greig*, Kampala

For the defendant:

Parekhi & Co, Kampala

Helen Monica Barrett v James Barrett
[1961] 1 EA 503 (HCU)

Division:	HM High Court of Uganda at Jinja
Date of judgment:	4 May 1961
Case Number:	1/1960
Before:	Sheridan J

[1] Divorce – Alimony – Order for wife made – No order for maintenance of children – Husband due arrears of salary and gratuity – Application to vary order – Order sought that husband pay wife part of arrears and gratuity – Power of court – Divorce Ordinance (Cap. 112), s. 25, s. 26 and s. 30 (U.) – Matrimonial Causes Act, 1950, s. 28 (1) and (3).

Editor's Summary

The petitioner and respondent were judicially separated by decree dated October 4, 1960, which gave the petitioner custody of the children of the marriage and also under s. 25 of the Divorce Ordinance ordered that the respondent should until further order pay the petitioner permanent alimony at the rate of Shs. 1,000/- per month. In anticipation of payment to the respondent of arrears of official salary and gratuities the petitioner sought to have the order for alimony altered by ordering the respondent to pay to her such part of the arrears and gratuities as the court deemed fit and for a provisional attachment of the said monies. The court had made an *ex parte* order on March 23, 1961, provisionally attaching the monies that were due or becoming due to the respondent and by a further order made on March 27, 1961, one moiety of his salary was attached. Relying on s. 26 of the Divorce Ordinance whereby the court has power to discharge, modify or suspend an order made under s. 25 thereof, where the husband has from any cause become unable to make the payments ordered, counsel for the respondent argued that the court had no power to increase permanent alimony as it had in the United Kingdom. Counsel for the petitioner referred to s. 30 which provides that in a suit for judicial separation the court can at any time make such order as it thinks fit with respect to the maintenance of minor children of the marriage.

Held –

- (i) the application was for the variation of an order which made no provision for the maintenance of the children but which under s. 25 of the Ordinance ordered the payment of alimony to the wife; that order was personal to her and died with her.
- (ii) it might be open to the petitioner to apply for an order for maintenance of the children under s. 30 of the Ordinance but it could be entertained on the present application.

Application dismissed. Order for provisional attachment dated March 23, 1961, discharged.

No cases referred to in judgment

Judgment

Sheridan J: This is an application by the petitioner to the court to alter its order of October 4, 1960, by ordering the respondent to pay to her such part of the arrears and gratuities he will be paid as the court shall deem fit and for provision to be made as to the costs hereof and for an order for the provisional attachment of the said monies.

By a decree dated October 4, 1960, it was ordered and decreed that there should be a judicial separation between the parties by reason of the respondent's cruelty to the petitioner. It was further ordered:

- “(1) that the petitioner should have the custody of the three children of the marriage who, I am informed, are eight, seven and four years of age.
- “(2) that the respondent do, out of his present income, and until further order of this court, pay or cause to be paid to the petitioner permanent alimony at the rate of Shs. 1,000/- per month, from the date of this decree and to be payable on the last day of each month commencing on the 31st day of October, 1960.”

On an *ex parte* application by the petitioner the court made an order dated March 23, 1961, whereby all monies by way of arrears of salary and gratuity in the hands of Government due or becoming due and payable to the respondent were provisionally attached pending further order of the court. By a further order dated March 27, 1961, one moiety of his salary was attached for execution of the decree.

In her supporting affidavit the petitioner avers:

- (1) that apart from the £50 per month she had only £40 per month which she earns from temporary employment with Drapers Ltd. and that she has no professional training.
- (2) that the respondent is an alcoholic and has been medically boarded out of his employment with the Treasury with effect from May 21, 1961, and that it is doubtful whether he will be able to earn a steady income after that date.
- (3) that over £900 will become due to the respondent after that date by way of arrears of salary under the recent salaries revision and gratuities.
- (4) that these sums are in the nature of extra income which have come to light since the order of October 4, 1960.
- (5) that if these sums are paid to the respondent he will spend them on alcohol and will not pay anything towards the maintenance of the three children.

In his affidavit in reply the respondent substantially agrees with the petitioner but:

- (1) denies that he is an alcoholic or that he will be unable to obtain future employment;
- (2) points out that the sums due are subject to deductions for income tax;
- (3) states that after paying £50 per month to the petitioner and £14 per month rent out of his salary of £90 per month he has practically nothing left for food and personal expenses.

The summons does not specify under which provision of the Divorce Ordinance (Cap. 112) this application is made. The order of October 4, 1960, securing the £50 per month to the petitioner was made under s. 25. By s. 26 the court is given power to discharge, modify or suspend such an order where the husband, from any cause, has subsequently become unable to make the payments. From this, Mr. Russell, for the respondent, argues that the court has no power to increase the amount of permanent alimony. He understandably describes the Ordinance as archaic—it came into force in 1904 and has never been amended—and he points out that in the United Kingdom, by the Matrimonial Causes Act, 1950, s. 28 (1) and (3), the court is given wide powers to vary orders for alimony and in exercising these powers it shall have regard to all the circumstances of the case, including any increase or decrease in the means of either party to the marriage. In these circumstances Mr. Hunt, for the petitioner, was obliged to fall back on s. 30 of the Ordinance which provides

that in a suit for judicial separation, the court may, at any time, make such order as it thinks fit with respect to the maintenance of the minor children of the marriage. He relies on the paragraph in the supporting affidavit which avers that the respondent will be unable to pay anything towards the maintenance of the children, but the application itself specifically requests a variation of the order of the court dated October 4, 1960, which makes no provision for the maintenance of the children as opposed to their custody. An order for the payment of alimony is something personal to the wife and it dies with her. In this case it may still be open to the petitioner to apply for an order for the maintenance of the children under s. 30 of the Ordinance but I am unable to let it in by a sidewind on the present application. It follows that the application is dismissed with costs. I also discharge the order for provisional attachment dated March 23, 1961.

Application dismissed. Order for provisional attachment dated March 23, 1961, discharged.

For petitioner:

RE Hunt

For respondent:

REG Russell

For the applicant:

Advocates: *Wilkinson & Hunt*, Kampala

For the respondent:

Russell & Co, Kampala

Dwarkadas Premji Unadkat v Mrs Shantibhai
[1961] 1 EA 505 (HCU)

Division: HM High Court of Uganda at Jinja

Date of judgment: 17 August 1961

Case Number: 46/1960

Before: Keatinge J

[1] Rent restriction – Premium – Mixed premises – Premium for letting for seven years – Payment of premium later made unlawful – Whether premium recoverable – Rent Restriction Ordinance (Cap. 115), s. 2, s. 3 (2) (U.) – Rent Restriction (Amendment) Ordinance, 1954 (U.).

Editor's Summary

The plaintiff sued for the return of a premium of Shs. 14,700/- paid by instalments to the defendant in

respect of the letting by the defendant to the plaintiff of part of a property comprising a shop with residential quarters behind, for seven years from December 1, 1951, at an annual rent of Shs. 1,500/-. The plaintiff claimed that the premises were let primarily as a dwelling-house since he had occupied residential quarters in the building for some years before 1951. The defendant's case was that the letting was for business purposes and that the premises were "premises" within the second proviso to s. 3 (2) of the Rent Restriction Ordinance.

Held –

- (i) the premises sub-let comprised both business and residential premises and were thus "mixed premises".
- (ii) the premises were let for business purposes and were within the second proviso to s. 3 (2) of the Rent Restriction Ordinance (Cap. 115) and although the Rent Restriction (Amendment) Ordinance, 1954, deleted the proviso (thus making the payment of premiums unlawful) it gave no remedy to a tenant who had paid an unlawful premium.
- (iii) in the present case the parties were in pari delicto both before and after September 30, 1954, and accordingly the plaintiff was not entitled under common law to recover the premium as money had and received to his use.

Judgment for the defendant.

Cases referred to:

- (1) *Harnam Singh v. Jamal Pirbhai*, [1951] A.C. 688.
- (2) *Kiriri Cotton Co. Ltd. v. Dewani*, [1960] 1 All E.R. 177; [1960] E.A. 188 (P.C.).

Judgment

Keatinge J: The plaintiff's claim is for Shs. 14,700/-. By an instrument in writing (exhibit 1) dated December 12, 1951, defendant sub-let to the plaintiff for a fixed term of seven years from December 1, 1951,

“all that piece of land being one shop together with residential quarters and outhouses pertaining thereto (the same shop which was formerly occupied by Morarji Karsandas and the residential quarter now in occupation by the tenant since last about eight years).”

The rent was agreed at Shs. 1,500/- per annum payable by twelve equal monthly instalments of Shs. 125/- each—

“In consideration of the tenant agreeing to pay to the sub-lessor a premium of Shs. 14,700/- (Shillings fourteen thousand seven hundred) only on the dates and in the manner hereinafter set out.”

The plaintiff now seeks to recover the premium so paid, that is Shs. 14,700/-

The design of the building in question is similar to many of those occupied by Indian shopkeepers in most towns in Uganda. The building is comprised of two shops at the front with one living quarter or dwelling behind each shop. It is common ground that for about eight years prior to 1951 plaintiff occupied one of the living quarters. The other living quarter and both shops during this period were sub-let to Messrs. Shah's Service Stores. It would appear that Shah's Service Stores sub-let the shop in front of plaintiff's living quarter to Morarji Karsandas. As a result of a court order the living quarter occupied by Shah's Service Stores and the two shops were vacated in October, 1951. It is not disputed that the living quarter or dwelling occupied by the plaintiff was a “dwelling-house” within the meaning of the Rent Restriction Ordinance and was protected.

Thus it would be seen that the premises sub-let to plaintiff comprised two categories of property, that is business and dwelling-house, and were “mixed premises”. It was held in *Harnam Singh v. Jamal Pirbhai* (1), [1951] A.C. 688 that the statutory scheme requires a choice between the two categories. It is necessary therefore to decide whether the premises are dwelling-house or business premises. Mr. James, for plaintiff, submits that the premises were let as a dwelling-house and thus the second proviso to s. 3, sub-s. (2) of the Rent Restriction Ordinance (as it stood prior to amendment in 1954) has no application. The second proviso reads:

“And provided further that nothing in this section shall be deemed to make unlawful the charging of a purchase price or premium on the sale, grant, assignment or renewal of a long lease of premises where the term or unexpired term is seven years or more.”

On the other hand Mr. Russell, for defendant, contends that the premises were let for business purposes and are “premises” within the meaning of the second proviso. “Premises” is defined in s. 2 of the Rent Restriction Ordinance as follows:

“ ‘premises’ means any building or part of a building let for business, trade, or professional purposes or for the public service, but shall not include any land other than the site of the premises or land within the curtilage of the premises;”.

The judge then reviewed the evidence and continued:

I find the following facts:

1. At the material time plaintiff knew that his dwelling was protected under the terms of the Rent Restriction Ordinance.
2. Plaintiff first approached Suchak and then Chunilal about the shop with a view to renting it.
3. The intention of both parties as regards the sub-lease was primarily the letting of the shop and when the premium was arranged both parties had the shop in mind. The dwelling was included in the lease on the suggestion of plaintiff and was ancillary to the shop.
4. Defendant did not bring any pressure to bear on plaintiff and in no way compelled him to sign the sub-lease.

Having considered all the circumstances and having regard to the above facts I find that the premises were let for business purposes and are “premises” within the meaning of the Rent Restriction Ordinance. It is conceded by Mr. James that on this finding the receipt of the premium by defendant was lawful and any premium paid up to September 30, 1954, cannot be recovered.

As from September 30, 1954, the Rent Restriction Ordinance was amended by the Rent Restriction (Amendment) Ordinance, 1954. The amendments included the deletion of the second proviso to sub-s. (2) of s. 3 of the Rent Restriction Ordinance. It would seem therefore that as a result of this amendment all premiums paid and accepted after September 30, 1954, were unlawful and the landlord would be liable to suffer the penalties set out in s. 3, sub-s. (2). As regards the present case the premium was to be paid by instalments as set out in the Schedule annexed to the plaint and marked “B”. This shows that after September 30, 1954, nine instalments of Shs. 1,050/- each were paid by plaintiff to defendant. Mr. James now claims that these payments were unlawful and are recoverable by the plaintiff.

The Rent Restriction (Amendment) Ordinance although it deleted the second proviso to s. 3, sub-s. (2), did not give any remedy to the tenant in respect of payment of any unlawful premium. In *Kiriri Cotton Co. Ltd. v. Dewani* (2), [1960] 1 All E.R. 177 it was held that the duty of observing the law being placed by s. 3, sub-s. (2), on the shoulders of the landlord for the protection of the tenant, the parties were not in pari delicto, and, therefore, though the illegal transaction was an executed transaction, the tenant was entitled at common law to recover the premium as money had and received to the use of the tenant.

On this authority the tenant can recover if he was not in pari delicto with the landlord. At the time the sub-lease was executed in this case, in my view, if the plaintiff can be said to have been then a member of a protected class at all he was not protected to the same extent as an ordinary statutory tenant of a dwelling-house. On the facts already found, in my judgment at the time of the letting the parties were in pari delicto. It is contended by Mr. James that because of a very providential alteration in the law about three years after the original agreement the position of these parties was thereby altered making the plaintiff not in pari delicto with the defendant. However, he is unable to cite any authority for this proposition. It is to be observed that the plaintiff did not withhold any payments of the instalments of premium after September, 1954. In my opinion in the circumstances of this case the parties were still in pari delicto after September, 1954, and the amounts paid by way of premium by plaintiff to defendant are not recoverable.

For these reasons plaintiff's claim is dismissed with costs.

Judgment for the defendant.

For the plaintiff:

AI James

For the defendant:

REG Russell

For the plaintiff:

Advocates: *Hunter & Greig*, Kampala

For the defendant:

Patel & Shah, Kampala

S M Bashir v The Commissioner of Income Tax [1961] 1 EA 508 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 May 1961
Case Number:	7/1961
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Gould JA
Appeal from:	H.M. Supreme Court of Kenya at Nairobi–Pelly Murphy, J

[1] *Income tax – Legislative powers – Statute altering procedure for enforcing payment of tax – Whether statute modifies law of bankruptcy – East African Income Tax (Management) Act, 1958, s. 1, s. 113, s. 114, s. 118, s. 119, s. 120 and the Fifth Schedule, para. 1 and para. 2.*

[2] *Income tax – Bankruptcy – Receiving order founded on final decrees for tax – Procedure for collection of tax – Prejudice to taxpayer – East African Income Tax (Management) Act, 1952, s.77, s.78, s.79, s.81, s.82, s.83, s.85, s.86, s.86A – East African Income Tax (Management) Act, 1958, s.1, s.113, s.114, s.118, s.119, s.120, s.124 and the Fifth Schedule, para. 1 and para. 2 – Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959, r. 19(K.) – Eastern African Court of Appeal Rules, 1954, r.54, r.58, r.74 – Bankruptcy Ordinance (Cap.30), s.3(1), s.5, s.6(K.) – East Africa (High Commission) Order-in-Council, 1947, s. 28 and Third Schedule – Rules of the Supreme Court, 1883, O. LVIII, r. 2.*

[3] *Appeal – Party directly affected by appeal – Appeal against receiving order – Official Receiver – Notice of appeal not served on Official Receiver – Eastern African Court of Appeal Rules, 1954, r.54 (5).*

Editor's Summary

In 1960 the Commissioner of Income Tax petitioned for a receiving order against the appellant in respect of arrears of tax assessed upon the appellant under the East African Income Tax (Management) Act, 1952. The acts of bankruptcy relied upon were bankruptcy notices with which the appellant had not complied. Appeals against the tax assessments to the local committee and the Supreme Court had by

April, 1959, been rejected and decrees in respect thereof were extracted in July, 1959. In default of further appeal the assessments were thus final and conclusive. In the meantime the 1952 Act had been repealed by the East African Income Tax (Management) Act, 1958, which was published on December 30, 1958, and applicable to assessments for the year of income 1958. Section 151 (1) of this Act provided that the transitional provisions in the Fifth Schedule to the Act should have effect for the purpose of transition from the repealed Act. At the date of publication of the 1958 Act the appellant's appeals to the Supreme Court against the assessments were pending. At the hearing of the Commissioner's petition for a receiving order the appellant continued to dispute the judgment debts and the acts of bankruptcy relied upon, but a receiving order was duly made and the Official Receiver was constituted receiver of the appellant's estate. On appeal against the receiving order the appellant claimed that the appeals against the assessments to the Supreme Court were pending on December 30, 1958, and the prejudice referred to in para. 1 of the Fifth Schedule to the 1958 Act was not limited to prejudice in the conduct of those appeals, that the application of section 113 (g) of the Act which accelerated the procedure for collection of the tax and consequently the appellant's liability to bankruptcy proceedings resulted in prejudice to the appellant and, accordingly, under para. 1 of the Fifth Schedule to the Act the provisions of the 1958 Act were not applicable; that in any event s. 113 (g) was ultra vires the legislative powers conferred upon the High Commissioner by the East Africa

(High Commission) Order-in-Council, 1947, as its effect was to amend the law of bankruptcy. The appellant also sought leave to put in under r. 74 of the Court of Appeal Rules certain demand notes received from the Commissioner and the applicant's replies thereto. For the respondent a preliminary objection was taken that the case was not properly before the court because the Official Receiver had not but should have been served with notice of appeal as a party directly affected by the appeal under Rule 54(5) of the Eastern African Court of Appeal Rules, 1954. It was also submitted, *inter alia*, that the appellant's argument upon s. 113(g) could not be entertained as it had not been included in the grounds of appeal.

Held –

- (i) on an appeal against a receiving order the Official Receiver is a party “directly affected by the appeal” and he should have been served with notice of the appeal under r. 54(5) of the Court of Appeal Rules.
- (ii) section 113(g) of the 1958 Act defines the effect of a determination by the court under the provisions of the Act and is merely ancillary to the principal provisions for the determination of disputes; it is no more ultra vires than the principal provisions.
- (iii) since it was not suggested that the additional evidence sought to be put in was not available at the hearing before the lower court, the application for leave to put this in must be refused.
- (iv) any assumption that there is a conflict between s. 113 (g) and s. 119 (1) (d) of the 1958 Act is wrong; the plain intention of the Act is that the two sections should be read together and so read they provide for a single course of action and not for alternative courses.
- (v) paragraph 1 of the Fifth Schedule to the 1958 Act refers to actual prejudice to the taxpayer upon the application of the Act in a particular case and does not provide that the 1952 Act is to apply where a party may be prejudicially affected by the application of the 1958 Act.
- (vi) the application of the 1958 Act had not resulted in any acceleration of the bankruptcy proceedings and the appellant had not thereby been prejudiced.

Appeal dismissed.

[Editorial Note: An appeal to the Privy Council is pending.]

Cases referred to:

- (1) *In re Webber; Ex parte Webber*, 6 Morr. 313; (1889), 24 Q.B.D. 313.
- (2) *Re Sleath; Ex parte Lotus Shoe Co.* (1913), 109 L.T. 222.
- (3) *Ex parte Dixon* (1884), 13 Q.B.D. 118.
- (4) *Karmali Tarmohamed and Another v. I.H. Lakhani & Co.*, [1958] E.A. 567 (C.A.).
- (5) *In re A Bankruptcy Notice*, [1907] 1 K.B. 478.
- (6) *In re Beauchamp; Ex parte Beauchamp*, [1904] 1 K.B. 572.

May 9. The following judgments were read:

Judgment

Sir Alastair Forbes V-P: This is an appeal against the making of a receiving order in respect of the estate of the appellant by the Supreme Court of Kenya on November 21, 1960. The order was made on a creditor's petition presented by the respondent, the Commissioner of Income Tax (to whom I will refer as "the Commissioner") in respect of a debt

“of Shs. 166,809/30, being the amount due by way of principal and costs on final Decrees obtained by the Commissioner of Income Tax against him on April 23, 1959, the consideration for the said decrees being income tax payable for the years of income 1951, 1952 and 1953”.

The acts of bankruptcy alleged by the petition to have been committed by the appellant were that he

“failed before the 12th day of August, 1960, to comply with the requirements of any of the Bankruptcy Notices Nos. 17, 18 and 19 of 1960 duly served on him . . ., or at any time before the date hereof or to satisfy the court that he has a counterclaim set-off or cross demand which equals or exceeds the amount of any of the decrees specified in the said bankruptcy notices, in accordance with section 3 (1) (g) of the Bankruptcy Ordinance.”

The income tax in question for the years of income 1951, 1952 and 1953 was assessed by the Commissioner under the East African Income Tax (Management) Act, 1952 (hereinafter referred to as “the 1952 Act”). The appellant appealed against the assessment to the “local committee” under s. 77 of the 1952 Act, and the local committee gave its decision on the matter on March 12, 1957. The appellant then appealed to the Supreme Court against the decisions of the local committee under s. 78 of the 1952 Act, the appeals being Civil Appeals Nos. 39, 40 and 41 of 1957 (hereinafter referred to as “Appeals Nos. 39, 40 and 41”). On April 23, 1959, these appeals were dismissed in the absence of the appellant, decrees being extracted on July 11, 1959.

In the meantime the 1952 Act had been repealed and replaced by the East African Income Tax (Management) Act, 1958 (hereinafter referred to as “the 1958 Act”). The 1958 Act was published on December 30, 1958, but was (by s.1) expressed to have come into operation, subject to the provisions of the Fifth Schedule, on January 1, 1958, and to apply to assessments for the year of income 1958 and to assessments for subsequent years of income. Sub-section (1) of s. 151 provided that:

“The transitional provisions contained in the Fifth Schedule shall, notwithstanding anything in this Act, have effect for the purposes of the transition from the provisions of the enactments repealed by this Act to the provisions of this Act.”

An argument for the Commissioner, with which I will deal later, was founded on para. 2 of the Fifth Schedule of the 1958 Act; but the important provisions of the Fifth Schedule in relation to this case are contained in para. 1. That paragraph (omitting sub-para. (b) of the proviso, which is not material) reads as follows:

- “1. Subject to this Schedule, the repealed enactment shall, notwithstanding its repeal, continue to apply to income tax chargeable, leviable, and collectable under such enactment in respect of the years of income up to and including the year of income 1957, as if such enactment had not been repealed.
- “Provided that as from the date of the publication of this Act in the *Gazette*, the provisions contained in Parts X to XVII inclusive of this Act shall apply as if such provisions had been contained in the repealed enactment, so, however:
 - (a) that no party to any legal proceedings by or against the Commissioner which are pending on the date of such publication shall be prejudicially affected by this paragraph;”.

The appellant’s appeals to the Supreme Court from the decisions of the local committee were, of course, pending at the date of publication of the 1958 Act;

and the material provisions of the 1958 Act to which I will refer are contained in Parts XIII and XIV of that Act.

The important provision of the 1958 Act, the application of which has to be considered, is para. (g) of s. 113, which provides that on an appeal to a judge against an assessment:

- “(g) the decree following the decision of the judge who heard the appeal shall have effect, in relation to the amount of tax payable under the assessment as determined by the judge, as a decree for the payment of such an amount, whether or not the amount of such tax is specified in the decree;”.

This provision had no counterpart in the 1952 Act. With the provision must be read para. (f) of s. 113 and r. 19 of the Income Tax (Appeal to the Kenya Supreme Court) Rules, 1959 (Legal Notice No. 12 of 1959 of the Subsidiary Legislation of the East Africa High Commission) (hereinafter referred to as “the Rules”) made under the powers conferred by s. 117 of the 1958 Act. Paragraph (f) of s. 113 is as follows:

- “(f) where the decision of the judge results in any amendment to the assessment, the assessment shall be amended accordingly and the Commissioner shall cause a notice setting out such amendment and the amount of tax payable to be served either personally or by registered post on the person assessed;”.

Rule 19 reads:

- “19. Where any decree following the decision of the court does not specify the amount of tax payable under the assessment as determined by the court then, for the purposes of the execution of any such decree, the Commissioner shall:
- (a) where the decision of the court results in any amendment to the assessment, file with the registrar a copy, certified by him, of a notice served under para. (f) of section 113 of the Act on the person assessed; or
 - (b) where the decision does not result in any amendment to the assessment, file with the registrar a statement signed by him setting out the amount of tax payable under the notice of assessment served under sub-s. (4) of s. 102 of the Act or the amending notice, as the case may be,
- and thereupon such decree shall have effect as if it were a decree for the payment of such amount of tax as is set out in such notice or statement, as the case may be.”

The decrees in Appeals Nos. 39, 40 and 41 did not specify the amount of tax payable under the respective assessments, being in the following form:

“This appeal coming on for hearing this day in the presence of J.C. Summerfield, Esq., counsel for the respondent, the appellant being absent and unrepresented, it is ordered that:

- (1) this appeal be and is hereby dismissed;
- (2) the appellant do pay to the respondent the taxed costs of this appeal;
- (3) the assessment as amended by the decision of the Nairobi Local Committee dated March 12, 1957, be and is hereby confirmed.”

Statements were accordingly filed by the Commissioner with the registrar on July 29, 1959, showing the total tax payable in each case. The statements were expressed to be filed pursuant to para. (b) of r. 19 of the Rules.

No appeal to this court has been filed against the decisions dismissing Appeals Nos. 39, 40 and 41. Apparently, applications were made to the Supreme Court for reinstatement of the appeals, which applications were dismissed on October 25, 1960. Notices of intention to appeal against the dismissal of the applications were filed on November 9, 1960, that is to say, one day out of time. No application for extension of time has been made, and appeals have not been lodged in accordance with r. 58 of the Eastern African Court of Appeal Rules, 1954 (hereinafter referred to as "the Rules of this court"). Time for lodging the appeals in pursuance of the notices of intention to appeal, had the latter been in time, would have expired on January 15, 1961. Under s. 114 of the 1958 Act (cf. s. 79 of the 1952 Act) the assessments as determined on the appeals to the Supreme Court are final and conclusive.

On July 29, 1959, a letter was sent from the Commissioner's office to the appellant forwarding copies of the statements filed with the Registrar under r. 19 of the Rules and informing the appellant that the total tax payable was Shs. 160,241/-. The second para. of this letter stated:

"The due date for payment of this tax was June 22, 1959, but, in all the circumstances, the due date has been extended until September 23, 1959."

In the event the tax was not paid and on August 4, 1960, the Commissioner caused Bankruptcy Notices Nos. 17, 18 and 19 of 1960 to be served on the appellant in pursuance of para. (g) of sub-s. (1) of s. 3 of the Bankruptcy Ordinance (Cap. 30 of the 1948 edition of the Laws of Kenya), the decrees relied on being the decrees which issued on the dismissal of Appeals Nos. 39, 40 and 41. The appellant applied to the court to have the bankruptcy notices set aside on the ground, *inter alia*, that a bankruptcy notice could not be founded on a decree under s. 113 (g) of the 1958 Act. These applications were dismissed on October 14, 1960. The appellant gave notice of intention to appeal to this court against these decisions, but did not pursue the matter. Time for lodging the appeals expired on January 4, 1961.

In the meantime the Commissioner presented the petition from which this appeal arises, the debt alleged to be due being made up, as already indicated, of the sums due in respect of principal and costs under the decrees in Appeals Nos. 39, 40 and 41. The appellant opposed the making of the receiving order, disputing, *inter alia*, the debt and the acts of bankruptcy. After hearing argument the learned judge of the Supreme Court held that there was a valid judgment debt and that there had been an act of bankruptcy, and he made the receiving order prayed for by the Commissioner, awarding costs to the Commissioner. The official Receiver of Kenya was constituted receiver of the estate of the appellant.

It is from this decision that the appellant now appeals, the grounds of appeal set out in the memorandum of appeal being as follows:

- "1. The learned judge failed to appreciate that the contention of the debtor (appellant) was *NOT* that an election had been made by the Commissioner (respondent) as between the collection procedure under The East African Income Tax (Management) Act, 1952, and that under the East African Income Tax (Management) Act, 1958, *BUT* as between the procedure laid down by s. 120 read with s. 124 and s. 113 (g) of the *same* Act, i.e. the 1958 Act and thereafter failed to consider whether the relevant correspondence did not in fact amount to an election.
- "2. In relation to the question whether the collection procedure of the East African Income Tax (Management) Act, 1952, applied to Civil Appeals Nos. 39, 40 and 41 of 1957, the learned judge misdirected himself in law in holding that 'the proceedings in this case had been terminated when the judge gave his decision in the appeals' and failed to consider that

under the 1952 Act the collection procedure under s. 86 is an integral part of the proceedings having regard to the phrases 'chargeable, leviable and collectable' appearing in para. 1 of the Fifth Schedule to the East African Income Tax (Management) Act, 1958.

- "3. The learned judge erred in holding that there had been no prejudice to the debtor (appellant) and gave no valid reason for arriving at the conclusion that there had been no prejudice."

Mr. Bechgaard, who appeared for the appellant on the hearing of the appeal, indicated that para. 2 and para. 3 constituted the main ground of appeal.

At the commencement of the hearing a preliminary objection was taken by Mr. Summerfield for the Commissioner, who submitted that the case was not properly before the court in that the Official Receiver had not been served with notice of appeal. He submitted that the Official Receiver was a party "directly affected by the appeal" and therefore should have been so served under r. 54 (5) of the Rules of this court; and he referred to *In re Webber; Ex parte Webber* (1), 6 Morr. 313, and *Re Sleath; Ex parte Lotus Shoe Company* (2) (1913), 109 L.T. 222. The relevant provision of the English Rules of the Supreme Court, 1883, (which applied when those cases were decided) is O. 58, r. 2, the wording of which is substantially similar to r. 54 (5) of the Rules of this court. In *Webber's* case (1) the decision turned on rules laid down by Cave, J., for the practice of his own court, and though Lopes, J., expressed the opinion that the Official Receiver was "directly affected" within O. 58, r. 2, by an appeal against a receiving order, the Master of the Rolls and Lindley, L. J., expressed doubt on the point. In *Sleath's* case (2), however, the rule in *Re Webber* (1) appears to have been accepted on the basis of O. 58, r. 2, and not on the basis of any special rules. Phillimore, J., said:

"A preliminary objection was taken that this appeal ought to be dismissed for the reason that no notice of appeal was served upon the Official Receiver. In *Re Webber (supra)* the Court of Appeal decided that such an objection was fatal and refused to extend the time for appealing in order that the Official Receiver might be served, but in the unreported case of *Re Sunderland* this court and the Court of Appeal agreed in the special circumstances of that case to extend the time to enable the Official Receiver to be served. We should have adopted a similar course in this case if it had appeared desirable, but we preferred to allow the appellant to argue his case *de bene esse*, and then if there appeared to be any substance in the appeal, to allow the matter to stand over for the purpose of serving the Official Receiver."

In the instant case we decided to adopt the course followed in *Re Sleath* (2) and hear the appeal *de bene esse*, and, if necessary, allow the matter to stand over for the purpose of serving the Official Receiver. In my opinion, the Official Receiver is a party "directly affected" by an appeal against a receiving order within the meaning of r. 54 (5) of the Rules of this court, and ought to be served with notice of the appeal; though this does not mean that he should necessarily appear—*Ex parte Dixon* (3) (1884), 13 Q.B.D. 118 at p. 127. This, however, is, so far as I am aware, the first time the matter has arisen in these territories, and I think that is sufficient reason for extension of time, if necessary, to allow the Official Receiver to be served.

When the preliminary objection had been disposed of as indicated, Mr. Bechgaard applied for the admission of additional evidence under r. 74 of the Rules of this court. The evidence in question consisted of certain demand notes sent to the appellant by the Commissioner in respect of the tax in question, and the appellant's replies thereto. Mr. Bechgaard, in support of his application, sought to draw a distinction between oral and documentary evidence. We saw

no reason to draw such a distinction or to deviate from the general rule that fresh evidence will only be admitted on appeal if, *inter alia*, it is shown that it was not available at the hearing in the lower court, or that reasonable diligence would not have made it so available (*Karmali Tarmohamed and Another v. I. H. Lakhani & Company* (4), [1958] E.A. 567 (C.A.)). As it was not suggested that the evidence in question was not available to the appellant at the time of the hearing in the Supreme Court, we refused the application.

At an early stage in his argument on the appeal Mr. Bechgaard raised the point that para. (g) of s. 113 of the 1958 Act, which is set out above, is *ultra vires* in that it is beyond the legislative powers conferred upon the High Commission by the East Africa (High Commission) Order-in-Council, 1947. Mr. Summerfield objected that this point did not arise on the grounds of appeal and was now being raised for the first time. It is, indeed, difficult to see how it does arise on the memorandum of appeal. Nevertheless, we heard Mr. Bechgaard on the point, intimating that we would be prepared to give Mr. Summerfield time to reply to it if he so desired. In the event, Mr. Summerfield did not ask for time. I propose to deal with this point first.

The relevant provisions conferring jurisdiction on the East Africa High Commission are s. 28 of the East Africa (High Commission) Order-in-Council, 1947 (Laws of the High Commission, Revised Edition, 1951, p. 305) and item 5 of the Third Schedule to that Order. The relevant parts of s. 28 and the Third Schedule read as follows:

“28(1) Subject to the provisions of this Order, it shall be lawful for the High Commission:

- (a) with the advice and consent of the Assembly, to make laws for the peace, order and good government of the Territories, in respect of the matters specified in the Third Schedule to this Order;

.....

“(2) Any law made in accordance with the provisions of para (a) of sub-s. (1) of this section may repeal, amend or suspend any law of the Territories relating to the matters specified in the Third Schedule to this Order.

“(3) Any law of any one of the Territories made after the commencement of this Order which shall be in any respect repugnant to the provisions of any law made in accordance with the provisions of para. (a) of sub-s. (1) of this section shall be read subject to such latter law, and shall, to the extent of such repugnancy, but not otherwise, be void and inoperative.”

.....

“Third Schedule.

Matters with Respect to which the Assembly may pass laws.

.....

“5. Income Tax—administrative and general provisions (but not including the rates of tax and allowances).”

.....

Mr. Bechgaard argued that s. 113 (g) of the 1958 Act had nothing to do with administrative and general provisions of income tax; that its effect was to amend the law of bankruptcy; that so far as it impinged on bankruptcy it was *ultra vires*; and that while it might be valid for execution purposes, it would not be valid to the extent that it purported to amend or repeal the law of bankruptcy.

I am, however, unable to see that s. 113 (g) can be said in any way to be an amendment of the law of

bankruptcy. The relevant words of sub-s. (1) of s. 3 of the Bankruptcy Ordinance are:

“3(1) A debtor commits an act of bankruptcy in each of the following cases:

.....

- (g) If a creditor has obtained a final decree or final order against him for any amount, and, execution thereon not having been stayed, has served on him . . . a bankruptcy notice under this Ordinance, and he does not within seven days after service of the notice . . . either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the decree or sum ordered to be paid . . .

“For the purposes of this para. and s. 4 of this Ordinance, any person who is, for the time being, entitled to enforce a final decree or final order, shall be deemed to be a creditor who has obtained a final decree or final order.”

There is no definition in the Bankruptcy Ordinance of the terms “final decree” or “final order”. The provisions of para. (g) of sub-s. (1) of s. 3 of the Bankruptcy Ordinance can be called into operation when a final decree or final order is in existence, but there is no limitation in the Bankruptcy Ordinance as to when or how a final decree or final order comes into existence. The terms must be construed strictly in their technical sense (*In re A Bankruptcy Notice* (5), [1907] 1 K.B. 478) but their meaning depends not on the Bankruptcy Ordinance, but on the general law as affected by any particular legislation. In general, the Civil Procedure Ordinance (Cap. 5) defines and provides for the decrees and orders of courts in Kenya. That Ordinance is not, however, exclusive, and must be subject to any particular legislation. Section 113 (g) of the 1958 Act does not, in fact, affect the status of a decree on an appeal to a judge—it is a final decree—but provides that it is to take effect as a decree for payment of the amount of tax involved. That is a provision for the enforcement of payment of tax. It does not alter or affect the law of bankruptcy, though it may enable bankruptcy proceedings to be founded on the determination in question. The income tax legislation of the High Commission makes elaborate provision for the determination by a court of disputes regarding liability to tax and provides that that determination has the effect of finally settling the liability of the taxpayer. It is not contended that those provisions are ultra vires. In my opinion, a provision such as s. 113 (g) of the 1958 Act which defines the effect of a determination by the court under the provisions of the Act is merely ancillary to the principal provisions of the Act for the determination of disputes, and is no more ultra vires than are the principal provisions. I would hold that the provisions of para. (g) of s. 113 of the 1958 Act fall within the terms of item 5 of the Third Schedule to the East Africa (High Commission) Order-in-Council, 1947.

It is convenient to deal next with an aspect of the matter argued by Mr. Summerfield. Mr. Summerfield contended that even if the appellant succeeded on the grounds of appeal set out in the memorandum of appeal, this would not entitle him to have the receiving order set aside. He argued that there were two steps in bankruptcy proceedings, first, the commission of an act of bankruptcy under s. 3 of the Bankruptcy Ordinance, and second, the presentation of a bankruptcy petition under s. 5 and s. 6 of the Ordinance; that the two steps are distinct proceedings; that in the instant case the commission by the appellant of an act of bankruptcy could not be challenged because the matter was *res judicata*, the appellant’s application to set aside the bankruptcy notice having been dismissed and no appeal against that decision having been taken; that in any case in the proceedings now before the court the fact of the commission of

an act of bankruptcy was not challenged, the proceedings being solely concerned with the creditor's petition under s. 6 of the Ordinance; that for the purposes of s. 6 it was sufficient to establish any debt owed by the debtor, and not necessarily the debt on which the act of bankruptcy was founded; that whatever the position as regards s. 113 (g) of the 1958 Act, it was not and could not be disputed that the appellant in fact owed the Commissioner the sums in respect of tax assessed in accordance with the decisions in Appeals Nos. 39, 40 and 41; that therefore the conditions of s. 6 were satisfied, whatever the decision on the grounds argued in the present appeal; and that therefore even if successful on his grounds of appeal the appellant could not claim to be entitled to have the receiving order set aside.

It is by no means clear to me that it is not competent for a debtor, on an appeal from a receiving order, to challenge the validity of the act of bankruptcy relied on the ground that there was no valid or effectual judgment debt (*In re Beauchamp; Ex parte Beauchamp* (6), [1904] 1 K.B. 572); but in any case the debts relied on by the Commissioner in his petition are the amounts:

“due by way of principal and costs on final decrees obtained by the Commissioner of Income Tax against him on April 23, 1959”.

I think the Commissioner is bound by his petition and that he is not entitled to rely on a debt other than that pleaded in the petition, that is to say, judgment debts arising on the final decrees in question. If the appellant can show that the final decrees do not have the effect of creating a judgment debt (and this is the substance of the appeal) I think he will have destroyed the basis on which this receiving order was made and will be entitled to have it set aside.

I come now to the grounds of appeal set out in the memorandum. Mr. Bechgaard argued his main grounds (i.e. grounds two and three) first, and I will follow the same order. Mr. Bechgaard's argument on these grounds shortly is that Appeals Nos. 39, 40 and 41 were pending at the date of publication of the 1958 Act; that the prejudice referred to in para. 1 of the Fifth Schedule is not limited to prejudice in the conduct of those appeals; that in any case the “proceedings” do not terminate on the conclusion of the appeal, but include subsequent steps for the recovery of the debt; that the application of s. 113 (g) of the 1958 Act resulted in prejudice to the appellant since it meant an acceleration of the procedure for collection of the debt and consequently of liability to bankruptcy proceedings; and that accordingly the provisions of the 1958 Act were not applicable.

It is convenient here to contrast the relevant provisions of the 1952 and 1958 Acts.

Under the 1952 Act when notice of appeal had been given, collection of the tax remained in abeyance until the appeal had been determined (s. 81). On the determination of an appeal to a judge (it is not necessary to consider appeals to a local committee) notice of the amount of tax payable under the assessment as determined by the judge had to be served by the Commissioner on the person assessed (s. 78 (7)). An appeal from a decision of the judge did not result in a further stay (s. 78 (11)). Subject to any right of appeal, the assessment as determined by the judge was final and conclusive (s. 79). Where payment of the tax had been held over pending determination of an appeal, the tax as determined on the appeal was required to be paid (ignoring the provisions of s. 82 which are not applicable in the circumstances of this case) within forty days from the date of service on the taxpayer of notification of the tax payable (s.85). If tax was not paid within such period (a) a penalty of twenty per cent. of the amount of the tax payable was (subject to partial remission in the discretion of the Commissioner) incurred by the taxpayer (s. 83 (1) (a)); and (b) the Commissioner was required to serve a demand note requiring payment of the tax and penalty within thirty days from the date of service, in default of which the

Commissioner might proceed to enforce payment (s. 83 (1) (b)). Finally, tax unpaid and penalty might be sued for and recovered by the Commissioner with full costs of suit (s. 86), or recovered by distraint (s. 86A).

Under the 1958 Act, where valid notice of objection is given, a first instalment or one-half of the tax charged (as the case may be) is payable in the ordinary course, notwithstanding that the assessment has not been finally determined (s. 118 (4)). As in the case of the 1952 Act a determination on appeal is final and conclusive (s. 114). On a determination on appeal to a judge, para. (f) and para. (g) of s. 113 have effect: that is to say, if the appeal results in amendment of the assessment, notice of the amount of tax payable must be served on the taxpayer by the Commissioner (s. 113 (f)); and the decree following the decision of the judge “shall have effect” as a decree for the payment of the amount of tax payable under the assessment as determined by the judge (s. 113 (g)). Where the assessment has been finally determined on appeal by a judge (a) where the decision of the judge has not resulted in any amendment to the assessment, the balance of tax payable is required to be paid on or before a date forty-five days after the date of the decision (s. 119 (1) (d) (i)); and (b) where the decision of the judge has resulted in an amendment to the assessment, the balance of tax payable is required to be paid on or before a date forty-five days after the date of service of notice under para. (f) of s. 113 (s. 119 (1) (d) (ii)). As in the case of the 1952 Act, an appeal from the decision of a judge does not result in any further stay (s. 119 (3)). If tax is not paid within the period referred to, then, as under the 1952 Act, a penalty of twenty per cent is incurred subject to possible remission, the Commissioner is required to serve a demand note, and if payment is not made within thirty days from the date of service of the demand note the tax and penalty “may be recovered in accordance with this Act” (s. 120). Finally, where a demand note has been served under s. 120 and payment has not been made within the thirty days specified, the tax including penalty may be sued for and recovered as a Crown debt with full costs (s. 124).

The principal difference, therefore, between the two Acts arises from the provision of s. 113 (g) of the 1958 Act, that the decree following the decision of a judge on appeal shall have effect as a decree for the payment of the tax as determined by that decision. There is also a difference in that half the tax assessed is payable notwithstanding appeal, but that does not require consideration in this case since none of the tax has in fact been paid. It will be necessary to consider the effect of s. 113 (g) in the light of s. 119, s. 120 and s. 124 of the 1958 Act, in order to determine the prejudice, if any, affecting the appellant by reason of the application of the 1958 Act, but before doing so there are two other aspects of the matter which it is convenient to consider here.

The first is that raised by ground 2 of the memorandum of appeal, that the basis for the learned judge’s decision on the question of prejudice was wrong. The learned judge said:

“The legal proceedings which were pending at the date of the publication of the 1958 Act were appeals Nos. 39, 40 and 41. I think that the clear meaning of sub-para. (a) of the proviso to para. 1 of the Fifth Schedule is that no party to any legal proceedings for the collection of tax which were pending at the date of publication of the 1958 Act shall be prejudicially affected in the conduct of those proceedings by either the continuance in force of the 1952 Act or the implied incorporation in it of Parts X to XVII of the 1958 Act. The proceedings in this case had been terminated when the judge gave his decision in the appeals. In my view there can be no suggestion that, because decrees were then extracted under s. 113 (g), the debtor was prejudiced in the conduct of those proceedings.”

I have already set out para. 1 of the Fifth Schedule to the 1958 Act. The material words in that paragraph are:

“the provisions contained in Parts X to XVII inclusive of this Act shall apply as if such provisions had been contained in the repealed enactment, so, however:

- (a) that no party to any legal proceedings by or against the Commissioner which are pending on the date of such publication shall be prejudicially affected by this paragraph;”

The Parts referred to include that relating to the collection, recovery and repayment of tax, and para. (a) of the proviso limits the prejudice, not to the legal proceedings or to the duration of the legal proceedings, but to the effect of the application of the paragraph. This must mean the application of the paragraph in relation to the subject matter of the proceedings, but bearing in mind that a taxing provision is, in case of doubt, to be construed in favour of the taxpayer, must, in my opinion, extend to the effect of the application of the paragraph in relation to collection and recovery of tax, and not merely to the conduct of the proceedings in question. I would, therefore, respectfully disagree with the learned judge when he seeks to limit the prejudice contemplated by para. (a) of the proviso to prejudice in the conduct of the legal proceedings which were pending at the date of publication of the Act, and would hold that that is not a good ground for rejection of the plea of prejudice.

The second point with which I will deal at this stage is an argument advanced by Mr. Summerfield that the provision in question (s. 113 (g)) is a procedural provision; that as such it would, by virtue of para. 2 of the Fifth Schedule to the 1958 Act, apply in any case after the date of commencement of the Act; and that therefore it is not necessary to rely on para. 1 of the Fifth Schedule. I think the short answer to this is that, apart from any other consideration, special provision is made in para. 1 of the Fifth Schedule for the application of certain provisions of the 1958 Act where legal proceedings were pending at the date of publication of the Act, and effect must be given to those provisions.

I return to the question of prejudice. Mr. Bechgaard argued that the effect of para. (g) of s. 113 of the 1958 Act was to accelerate the liability of a taxpayer to be made bankrupt; that bankruptcy was quasi-penal; and that therefore such acceleration was clearly prejudicial. This argument was based largely on the assumption of conflict between the provisions of s. 113 (g) and s. 119 (1) (d) of the 1958 Act, and the consequential conclusion that two entirely distinct courses of action were available to the Commissioner. The relevant provisions of sub-s. (1) of s. 119 are as follows:

- “119. (1) Subject to sub-s. (2) [which is not relevant in this case] where a valid notice of objection has been given under s. 109, then the second instalment of the tax charged in the assessment or, where the tax charged is not payable in instalments, the remaining one-half of the tax so charged shall be payable—

.....

- (d) in any case where the assessment has been finally determined on appeal by a judge and the decision of the judge—
 - (i) has not resulted in any amendment to the assessment, on or before a date forty-five days after the date of such decision;
 - (ii) has resulted in an amendment to the assessment, on or before a date forty-five days after the date of service of the notice under paragraph (f) of section 113.”

Mr. Bechgaard argued that the Commissioner, acting on s. 113 (g), could proceed to extract a decree and forthwith enforce payment of tax, either by execution or the institution of bankruptcy proceedings, without regard to s. 119

(1) (d); and the liability to bankruptcy proceedings would thereby be greatly accelerated in comparison with the procedure applicable under the 1952 Act, or, for that matter, under s. 119 (1) (d), s. 120 and s. 124 of the 1958 Act.

I am, however, quite unable to read the 1958 Act in this way. It appears to me clear that s. 113 (g) and s. 119 (1) (d) are intended to be read together. Sub-paragraph (ii) of s. 119 (1) (d) refers expressly to para. (f) of s. 113, which of necessity is linked with para. (g). It is clear that s. 113 had not been overlooked by the draftsman when he framed s. 119. As Mr. Summerfield stressed, the effect of para. (g) of s. 113 is automatic and takes effect in every case where a judge has decided an appeal under the section; while para. (d) of s. 119 (1) also applies in terms to any case where the assessment has been finally determined on appeal by a judge. It is incumbent on the court to avoid a construction of the Act which results in a direct conflict of two provisions and a patent absurdity unless such a construction is unavoidable. In the instant case I see nothing to make such a construction necessary. In my opinion the plain intention of the Act is that the two sections shall be read together, and that while a decree extracted under s. 113 (g) has the effect of a decree for the payment of the amount of tax due as a result of the relevant decision, yet by reason of section 119 (1) (d) the times there specified are allowed for payment. Similarly, s. 120 of the 1958 Act is mandatory. Sub-section (1) of that section reads:

“120. (1) Subject to sub-s. (3), if any tax is not paid on the due date—

- (a) a sum equal to twenty per cent of the amount of the tax payable shall be added thereto as a penalty; and
- (b) the Commissioner shall cause a demand note to be served, either personally or by registered post, on the person assessed;

and if payment of the tax and penalty is not made within thirty days from the date of service of such demand note, then such tax and penalty may be recovered in accordance with this Act.”

It is only after the expiration of thirty days from service of the demand note under s. 120 (1) that “such tax and penalty may be recovered in accordance with this Act”. I see no reason to regard those words as referring solely to recovery under s. 124 of the Act. Section 124 provides for recovery of tax by suit. But it is to be remembered that s. 120 and s. 124 are general sections referring to undisputed assessments and assessments finally determined by a local committee as well as to assessments determined by a judge. In the case of undisputed assessments and assessments determined by a local committee, the procedure in s. 124 would apply to recovery of both tax and penalty. But in cases where there has been a determination by a judge, the effect of the Act is that there is in existence a decree for the payment of the amount of tax due. Recovery of the tax under that decree is, in my view, recovery “in accordance with this Act”. Penalty, of course, is not included in the decree and would fall to be recovered under s. 124. But the fact that the tax may be recoverable by virtue of the effect of the decree under s. 113 (g) does not mean that the mandatory provisions of s. 120 are to be ignored. Just as s. 119 (1) (d) applies without qualification to any case where an assessment has been determined by a judge, so s. 120 applies in terms to any case where tax is not paid on the due date. It is only after expiry of the period limited that “tax and penalty may be recovered in accordance with this Act”. In my opinion it is only at this point that the Commissioner can seek to enforce payment by virtue of the decree under section 113 (g). The effect, in fact, of the Act is similar to that where judgment for a sum of money has been recovered but execution has been stayed for a specified period.

If I am right in my construction of the relevant provisions of the 1958 Act, what then is the prejudice suffered? Under the 1952 Act, notice of the amount of

tax payable had to be served on the taxpayer. Under the 1958 Act such notice is not necessary unless the decision of the judge has resulted in amendment of the assessment (s. 113 (f)). But under r. 19 of the Rules a statement of the tax payable must be filed with the registrar, and copies of the relevant statements so filed were in fact delivered to the appellant (exhibit A). Thereafter, under the 1952 Act, a period of forty days must elapse, to be succeeded by service of a demand note and a further period of thirty days whereupon the Commissioner could sue for the tax and penalty. Under the 1958 Act a period of forty-five days must elapse from (in the instant case) the date of the decision of the judge on appeal, to be succeeded by service of the demand note and a further period of thirty days, whereupon the Commissioner could proceed to execution or, as in the instant case, to the institution of bankruptcy proceedings. The need for a further suit to recover judgment for the amount of the tax is obviated under the 1958 Act. Can this difference in procedure be said to result in prejudice, possible or actual?

I would construe para. 1 of the Fifth Schedule to the 1958 Act as referring to actual prejudice. The relevant words are: "no party . . . shall be prejudicially affected by this paragraph". The paragraph does not say that the provisions of the 1952 Act are to apply where a party *may* be prejudicially affected by the application of the provisions of the 1958 Act. If this is correct, I can see no possible prejudice in the instant case. A period of more than fifteen months in fact elapsed between the date of the decision of the judge (April 23, 1959) and the service of bankruptcy notices (August 4, 1960). Clearly, if the procedure under the 1952 Act had been followed, there would have been ample time to reach the stage of bankruptcy proceedings by August 4, 1960. In fact, therefore, and whether Mr. Bechgaard's argument as to the effect of s. 113 (g) of the 1958 Act is right or wrong, the application of the provisions of the 1958 Act has not resulted in any acceleration of the bankruptcy proceedings, and therefore, in my view, the appellant has not been prejudiced. The position is similar to that relating to the requirement under the 1958 Act for the immediate payment of half tax. A demand for the immediate payment of half tax would undoubtedly be prejudicial to the taxpayer. No such demand was in fact made in the instant case, and it was not argued that because the Commissioner might have made such a demand under the provisions of the 1958 Act, the provisions of the 1952 Act relating to collection of tax must apply.

Even on the basis of possible prejudice which might have arisen from the application of the provisions of the 1958 Act, I do not think that the appellant has made out a case. If the Commissioner had proceeded to act within the shortest time specified in the 1958 Act, the bringing of bankruptcy proceedings would have been accelerated by (a) the time it would take to serve notice under section 78 (7) of the 1952 Act; and (b) the time it would take to institute a suit and recover judgment under s. 86 of the 1952 Act. Neither of these times is definite and they need not be long. The suit would be a mere formality, no defence being possible, though it would involve the taxpayer in the payment of additional costs. There could, therefore, be some acceleration of the moment when it could be possible to levy execution or institute bankruptcy proceedings. It is to be remembered, however, that there is a debt due from the taxpayer to the Commissioner. Certain days of grace are allowed before the Commissioner can take action to enforce payment, but nevertheless the debt is in existence and it is the legal duty of a debtor to seek out his creditor and discharge the debt. The fact that the period within which the creditor, the Commissioner, can take action to enforce payment of the debt could be shortened to some degree is not, in my view, prejudice of which the law will take account, bearing in mind the legal duty of the debtor.

I prefer, however, to rest my conclusion on the basis that the prejudice contemplated in para. 1 of the Fifth Schedule of the 1958 Act is actual prejudice

arising from the way in which the provisions of the 1958 Act may be applied in any particular case.

For the reasons given I think the main ground of appeal argued by Mr. Bechgaard fails. It remains to consider ground 1 of the memorandum of appeal. This ground is based on the assumption that there are alternative courses open to the Commissioner. It is then contended that by his course of action, in particular by the delivery of the letter of July 29, 1959 (exhibit A), he had elected to pursue one course to the exclusion of the other. I have already dealt fully with the question whether the 1958 Act provides alternative courses of action for the recovery of tax and have concluded that it does not; that sections 113 (f) and (g), 119 (1) (d) and 120 are to be read together and that together they provide for a single course of action. In view of this conclusion no question arises of a choice between different courses of action. I am of opinion this ground of appeal must fail.

For the reasons given I would dismiss the appeal with costs. In view of this conclusion, it is not necessary to consider whether there should be an adjournment to enable the Official Receiver to be served with notice of the appeal.

Sir Kenneth O'Connor P: I agree and have nothing to add. The appeal is dismissed with costs.

Gould JA: I have had the advantage of reading the judgment prepared by the learned Vice-President, with which I entirely agree, and to which I have nothing to add.

Appeal dismissed.

For the appellant:

K Bechgaard QC and AH Shah

For the respondent:

JC Summerfield (Deputy Legal Secretary, East Africa High Commission)

For the appellant:

Advocates: *Satish Gautama*, Nairobi

For the respondent:

The Legal Secretary, EA High Commission, Nairobi

Pyaralal Melaram Bassan and Wathobia s/o Kiambu v R
[1961] 1 EA 521 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 August 1961
Case Number:	68/1961
Before:	Sir Alastair Forbes V-P, Sir Trevor Gould and Crawshaw JJA
Appeal from:	H.M. Supreme Court of Kenya—MacDuff, J

[1] Criminal law – Murder – Practice – Joint trial – Application for separate trials refused – Whether injustice done.

[2] Criminal law – Evidence – Accomplice evidence – Corroboration – Whether retracted confession can corroborate evidence itself requiring corroboration.

[3] Criminal law – Statement to police – Statement made by accused to investigating officers – Whether statement admissible.

[4] Criminal law – Practice – Murder – Information – Amendment – Accused re-tried on original information – Information amended by inserting new date and place of trial – Whether alterations render information a nullity – Criminal Procedure Code (Cap. 27), s. 83, s. 250, s. 254, s. 256, s. 271 (1) and s. 381 (K.).

Editor's Summary

The two appellants were convicted of the murder of the wife of the first appellant and were sentenced to death. The prosecution relied much on the evidence of a witness known as “Tanganyika”, who said that the first appellant

had discussed with him how to dispose of his family and that the second appellant whom he had sent to the first appellant had agreed to kill the first appellant's family. Tanganyika also said that one, Mwangi s/o Kihara had been approached by the first appellant to carry out the murder and testified to other abortive attempts by the first appellant to get his family killed. Tanganyika claimed that he had always disapproved of the murder plan. The trial judge did not reach a finding whether Tanganyika was an accomplice but treated him as such, and his evidence was accepted by both the trial judge and the assessors. On appeal it was submitted on behalf of both appellants that they had been prejudiced by the judge's refusal to order separate trials, that the judge erred in finding that there was corroboration of Tanganyika's evidence and, therefore, should not have accepted his evidence, that statements made by each of the appellants should not have been admitted, that incorrect inferences had been drawn from the evidence given by the police pathologist and that the information was defective and a nullity.

Held –

- (i) the question of separate trials was a matter within the discretion of the trial judge; the judge had properly exercised his discretion, he had directed the assessors to consider and had himself considered the case of each appellant separately on the relevant admissible evidence and the joint trial of the appellants had not resulted in any miscarriage of justice.
- (ii) the question of credibility of a witness is essentially one for the trial judge; the trial judge had taken full account of Tanganyika's character, the discrepancies in his evidence and his strange story and he had nevertheless decided, in the light of all the evidence, that he was to be believed, a view which was also held by the assessors; no misdirection had been brought to the notice of the court showing that the trial judge had failed to take into account material matters, or had regard to matters which he should have ignored.
- (iii) having held that Tanganyika was to be treated as an accomplice, the trial judge properly looked for corroboration of his evidence implicating the appellants; and his evidence of the conspiracy to kill the first appellant's family was sufficiently corroborated by the evidence of the several witnesses referred to by the trial judge.
- (iv) while it is true that, as a general rule, evidence which itself requires corroboration cannot provide corroboration of other evidence also requiring corroboration, retracted statements are not of the same quality as accomplice evidence; a statement made by an accused person, whether amounting to a confession or not, may in a proper case amount to corroboration of accomplice evidence; therefore, there was no reason why the retracted statements of the appellants should not have been taken into account as corroboration of Tanganyika's evidence.
- (v) the fact that certain of the statements made by the appellants were made to police officers who were investigating officers in the case did not automatically result in the exclusion of those statements from evidence; there was no reason to interfere with the exercise of the trial judge's discretion in admitting the various statements made by the appellants.
- (vi) the trial judge was fully justified in reaching the conclusions he did, based on the circumstantial evidence relating to the actual killing.
- (vii) the information before the court of trial on which the appellants were arraigned at the second trial was the same as had been before the court at the first trial, but the heading had been amended as a result of the change of the date and place of trial; the Supreme Court had inherent jurisdiction to

give directions to make such alterations consequent upon an order for re-trial by an appellate court.

- (viii) in the absence of any indication to the contrary, the court would assume that the amendments to the information in the instant case were made in pursuance of such directions and it was doubted in view of s. 271 (i) of the Criminal Procedure Code whether it was open to the appellants to object to the form of the information at that stage; but even assuming that the alterations were unauthorised, they did not render the information a nullity, but amounted to no more than a technical irregularity curable under s. 381 of the Criminal Procedure Code.

Appeal dismissed.

Cases referred to:

- (1) *Youth v. R.*, [1945] W.N. 27.
- (2) *R. v. Grondkowski*, [1946] 1 All E.R. 559.
- (3) *R. v. Gibbins and Proctor*, 13 Cr. App. R. 134.
- (4) *Credland v. Knowler*, 35 Cr. App. R. 48.
- (5) *Njunguna s/o Kimani and Others v. R.* (1954), 21 E.A.C.A. 316.
- (6) *Israeli Kamukolse and Others v. R.* (1956), 23 E.A.C.A. 521.
- (7) *Nayinda s/o Batungwa v. R.*, [1959] E.A. 688 (C.A.).
- (8) *R. v. Voisin*, [1918] 1 K.B. 531.
- (9) *R. v. Bass*, [1953] 1 All E.R. 1064.

Judgement

Sir Alastair Forbes V-P: read the following judgment of the court: The two appellants were, on May 3, 1961, convicted by the Supreme Court of Kenya, sitting at Nairobi, of the murder, on March 11, 1960, of Satyavati, wife of the first appellant, and were sentenced to death. They now appeal to this court against conviction and sentence.

The first appellant is an Asian. At the material time he was an employee of the East African Tobacco Company, and was living at Nyeri with his wife, Satyavati, and three young children, in a house which he shared with one Amirali Naziralli. His employment involved travel in the Nyeri, Nanyuki, Embu and Meru districts, and for this purpose the company provided a van and a driver, one Stephen Iheri.

The second appellant is a Kikuyu. He had no fixed abode, but was living at Nyeri at the material time and was supporting himself by doing odd jobs, mainly of a gardening or labouring nature.

Also employed by the East African Tobacco Company at Nyeri at the material time was one Kinyua s/o Njuguna, commonly known as “Tanganyika”, by which name we will refer to him.

On March 11, 1960, at about 8.35 p.m. a Dr. Boon, who was then living in a house in Airfield Road, Nyeri, was driving his car down the drive of his house towards Airfield Road when he encountered a van driven by the first appellant. The first appellant got out of the van and told Dr. Boon that his wife and family had been attacked by Africans and were dead in the van. Dr. Boon led him to the Nyeri Hospital where, at about 9 p.m., he handed the first appellant over to a Dr. Helm. Dr. Helm looked into the van

and saw in the front the bodies of three children and in the back the body of a woman, all apparently dead. Dr. Helm took the first appellant into the hospital for examination and treatment, during which the first appellant gave him an account of what he alleged had occurred. Dr. Helm found the appellant's injuries were superficial, so he returned to the van, arriving there at the same time as the police, who had been notified of the occurrence. Dr. Helm and the police officers examined the van together, and it was then found that one of

the children in the front of the van, a female aged about 4 ½ years, was still alive. She was removed from the van and taken to the operating theatre. The dead body in the back of the van was that of the first appellant's wife, Satyavati.

The examination of the first appellant by Dr. Helm showed him to be suffering from a cut on the back of his left shoulder, 1 inch long and ¼ inch deep; eight cuts and scratches on the outer surface of his left arm commencing 4 inches below the point of the shoulder; three cuts on the inner surface of his left arm; and some other minor scratches on his right arm and back. These injuries were all superficial. There had been slight bleeding from them, and there was bruising developing over the injuries on the left arm. The first appellant did not appear unduly shocked.

The bodies of the first appellant's wife and children were terribly injured. They had been slashed with a sharp instrument such as a panga. A post-mortem examination of the body of Satyavati was carried out on March 12 by Dr. Rogoff, the police pathologist from Nairobi. He gave evidence that Satyavati had sustained more than thirty-five injuries, including a large wound, probably caused by four or five individual cuts, on the upper part of the neck, extending from behind the right ear into the back. This injury cut through the sixth vertebra, the right carotid artery and the right jugular vein, and would cause instant death. Blood from this injury would have spurted out in quantities. She had other severe injuries of the right side of the face and head, and her right wrist was severed by a clean cut. Grouping of the blood showed that of Satyavati to be group "O" and that of the children to be group "A", a fact which enabled the origin of much of the copious blood splashing in the van to be identified.

The first appellant's story of the alleged attack, which he told to Dr. Helm, repeated to Superintendent Baker of the Kenya Police who came to the hospital on the night of March 11, and on the morning of March 13 repeated again to Superintendent Baker, was to the effect that he was returning in the van from Nanyuki to Nyeri along Airfield Road accompanied by his wife and three children, all of whom were in the front seat, the only seat, of the van; that he had reached the brow of a hill and there was a straight road ahead of him; that in his headlights he saw three Africans in the road, backs towards him, walking slowly in the direction of Nyeri; that as he reached these Africans he slowed down; that his windscreen was shattered; that he was frightened, the engine stalled, and the van stopped; that he started to get out of the van and as he was partly out a man shattered the window of the door of the van on his, the driver's, side; that as he was still getting out of the door the man demanded money and he (the first appellant) threw his purse to the man; that he was struck by this man at the door, and that he was then grabbed and struck by a second man; that he managed to get free, leaving his jacket in the hands of the man, and ran into some bushes by the side of the road; that he heard screams coming from his wife and children; that he kept on running and eventually hid in some bushes; that after about half an hour he returned to the van to find the Africans gone, the bodies of his wife and son lying beside the van and the bodies of his two daughters lying in the front of the van; that he picked up the bodies from the road and put them in the van and then drove on till he saw the lights of a vehicle, which he went to meet, and which turned out to be Dr. Boon's car.

The first results of police investigations appeared to support the first appellant's account of the affair. However, on March 16 information reached the police from various sources, including Tanganyika, and one Mwangi s/o Kihara, as a result of which further statements were taken from the first appellant that night. The second appellant also was called to the C.I.D. office in Nyeri on March 16 for inquiries and certain statements purporting to account for his movements on March 11 were taken from him. He was not in custody at

this time, but in the evening at about 9 p.m. a statement was taken from him under caution. On the morning of March 17 both appellants were arrested and charged with the murder of Satyavati. Subsequently certain further statements were made by the second appellant to a Superintendent Mackenzie at Nyeri Prison.

In due course the appellants were committed for trial, and in May, 1960, were tried at Nyeri. We will refer to this trial as the first trial. At the first trial, on May 25, 1960, both appellants were convicted of the murder of Satyavati and were sentenced to death. They appealed to this court against conviction and sentence, and on November 15, 1960, this court set aside the convictions and sentences but ordered that both appellants should be re-tried. The first appellant and the Crown both petitioned the Privy Council for special leave to appeal against the decision of this court. These petitions were dismissed on March 9, 1961. The second trial of the appellants opened in April, 1961. At the commencement of the trial an application was made by counsel for the first appellant, supported by counsel for the second appellant, for separate trials of the two appellants, but the application was refused. On May 3, 1961, the two appellants were again convicted and sentenced to death. The trial was before a judge sitting with assessors, and it may be mentioned that the assessors were unanimously of the opinion that both appellants were guilty of the murder of Satyavati. It is from this conviction and sentence that the present appeal has been brought.

The case for the Crown at the trial rested largely on the evidence of Tanganyika. Very briefly, this evidence was to the effect that in January, 1960, the first appellant had approached Tanganyika with a view to disposing of his, the first appellant's, family; that after sundry meetings and discussions Tanganyika sent the second appellant to the first appellant and the second appellant agreed to kill the first appellant's family; that an occasion for the murder was arranged, but the second appellant failed to carry out the murder and merely stole some money from the first appellant's house; that Mwangi s/o Kihara was then approached by the first appellant to carry out the murder, and another occasion for the murder was arranged in connection with a trip to Meru, but that Mwangi, having got some money from the first appellant, disappeared; that other abortive attempts by the first appellant to get his family killed followed, in particular one near Embakasi Airport, Nairobi; that on the day of the murder the second appellant was instructed to go to Nanyuki to meet the first appellant; and that Tanganyika, suspecting what was going to happen, took steps to create an alibi for himself. Tanganyika maintained that throughout he had disapproved of the proposed murders and had tried to prevent them taking place. The learned judge did not come to a finding whether strictly in law Tanganyika was an accomplice, but quite properly, in our opinion, he treated him as such; nevertheless he believed Tanganyika's evidence, as did the assessors. The learned judge found ample corroboration of Tanganyika's evidence in material details tending to implicate both the appellants, in the evidence of other witnesses called by the Crown and in the statements made by the appellants. Mwangi s/o Kihara also gave evidence for the Crown supporting Tanganyika's evidence of the conspiracy to kill the first appellant's family and of his, Mwangi's, part in it. The learned judge, however, discarded Mwangi's evidence on account of a "glaring discrepancy" between his evidence at the preliminary inquiry and his evidence at the trial. The Crown also called evidence of the condition of the van, results of investigations at the scene of the crime, and nature of the injuries on Satyavati and the first appellant, which the learned judge considered showed conclusively that the murder of Satyavati and the children in the van could not have happened in a manner which could only lead to the inference that the killing was done with the first appellant's connivance.

The grounds of appeal relied on by the two appellants are broadly similar. At the request of counsel for the two appellants, counsel for the second appellant addressed the court first. Counsel for the first appellant then adopted and relied on the arguments of counsel for the second appellant so far as they were applicable to the first appellant's appeal, and confined his own address to the court to grounds peculiar to the first appellant's case. It will be convenient to follow the same order and consider the arguments advanced by counsel for the second appellant first.

There are twelve grounds of appeal set out in the second appellant's memorandum of appeal, but counsel for this appellant, Mr. Shroff, argued these under five heads, namely: (a) nullity of the information on which the appellants were tried; (b) Tanganyika's evidence; (c) Dr. Rogoff's evidence; (d) admissibility of statements made by the second appellant; and (e) the refusal of the application for separate trials. We will consider the particular grounds of appeal under these heads.

It is convenient to dispose immediately of the question of the refusal of separate trials. Ground 12 in the second appellant's memorandum of appeal reads:

"12. The learned judge's refusal of separate trials to the two appellants was wrong and the appellant was prejudiced thereby".

Ground 2 of the first appellant's memorandum reads:

"2. The learned judge erred in not granting a separate trial to the appellant".

Mr. Shroff contended that parts of the evidence, in particular parts of the evidence given by Tanganyika and Mwangi, were not evidence against the second appellant but were nevertheless very prejudicial to him and must have affected the minds of the assessors and the learned judge. He conceded that he could not say from the judgment that the learned judge had wrongly taken into account any particular item of evidence which was not admissible against the second appellant, but submitted that it was sufficient to show that certain matters were in evidence which were prejudicial to the appellant and might have influenced the court. Mr. Rao, for the first appellant, adopted these arguments.

It is well established that the question whether there should be joint or separate trials of persons jointly charged with an offence is essentially a matter for the discretion of the trial judge, such discretion, of course, to be exercised judicially. In *Youth v. R.* (1), [1945] W.N. 27, Lord Porter, delivering the reasons of the judicial committee of the Privy Council for dismissing the appeal, said:

"It was true, no doubt, that in all joint trials the mind of the jury *might* be influenced by the reception of evidence which was only admissible against one of the accused, but the practice in this country had always been in a joint trial to admit such evidence, leaving it to the presiding judge to warn the jury that the evidence must not be used to strengthen the case against, or lead to the conviction of, a prisoner against whom it was not admissible.

"In truth, the real complaint in the present case was that the prisoners were tried jointly and not separately—the submission being that they should have been tried separately and the husband's case taken first. The question of joint or several trials, however, had always been left to the discretion of the presiding judge. The discretion must, of course, be a judicial one, but here their lordships would point out that no application was made to sever the trials, nor, in their view, would it have been possible to override the judge's discretion had he been asked to try the prisoners separately and refused to do so."

In *R. v. Grondkowski* (2), [1946] 1 All E.R. 559 at p. 561, Lord Goddard, L.C.J., delivering the judgment of the Court of Criminal Appeal in England

cited with approval the following passage from the judgment of the court in *R. v. Gibbins and Proctor* (3), 13 Cr. App. R. 134:

“The rule is, that it is a matter for the discretion of the judge at the trial whether two people jointly indicted should be tried together or separately. But the judge must exercise his discretion judicially. If he has done so this court will not interfere, but that is subject to this qualification. If it appeared to this court that a miscarriage of justice had resulted from the prisoners being tried together it would quash the conviction. Here it is clear that Roche, J., exercised his discretion; he separated the defences carefully, pointing out what was evidence against one prisoner and not against the other. It is not enough to say that counsel could have defended them more easily if they had been tried separately. There is no ground for thinking that there was any miscarriage of justice. There may have been many things made clear to the jury which would not have been made clear if the prosecution had been embarrassed by having to deal with the two cases separately. The whole story was before the jury of what went on in the house where the two appellants lived together. There is no ground for thinking that either of them was improperly prejudiced by their being tried together.”

In another part of the judgment Lord Goddard said:

“*Prima facie* it appears to the court that where the essence of the case is that the prisoners were engaged on a common enterprise, it is obviously right and proper that they should be jointly indicated and jointly tried.”

In the instant case the learned trial judge carefully considered the application for separate trials and refused the application in a written ruling. It is not suggested that he exercised his discretion unjudicially or took into account matters which he should not have taken into account. The essence of the case against the appellants was that they were acting in concert in a common enterprise. It may be that some evidence was before the court which could not have been introduced against the second appellant had he been tried separately, and similarly in the case of the first appellant, but this in itself is not a ground for ordering separate trials. We are satisfied that the learned trial judge properly exercised his discretion, that he directed the assessors to consider, and himself considered, the case of each appellant separately on the relevant admissible evidence, and that the joint trial of the appellants has not resulted in any miscarriage of justice. This ground of appeal accordingly fails in respect of each appellant.

Ground 5 of the second appellant’s memorandum of appeal, which in substance is the same as grounds 5 and 7 of the first appellant’s memorandum, stems from the joint trial issue. It reads:

“5. The learned judge erred in holding that the portions of the evidence of Kinyua s/o Njuguna (P.W. 9) and Mwangi s/o Kihara (P.W. 10) objected to by the defence were admissible in evidence.”

The objection is to those portions of the evidence which are admissible against one or other of the appellants only. What we have said above disposes of these grounds of appeal.

At the commencement of the hearing of the appeal, Mr. Shroff sought leave to substitute a new ground of appeal for the first ground in the memorandum of appeal of the second appellant. Leave was granted, and in due course a similar application by Mr. Rao for the first appellant was also granted. This new ground of appeal is as follows:

“The trial was a nullity in that there was no information before the learned trial judge upon which the appellant could be arraigned. The

document purporting to be the information was not signed or filed in court by or on behalf of the Attorney-General and was not served on the appellant. The said document was unlawfully removed from the record of the previous trial of the appellant (being the Criminal Case No. 41 of 1960 of Her Majesty's Supreme Court of Kenya at Nyeri) and was altered unlawfully by person or persons unknown."

The document before the trial court on which the appellants were arraigned at the second trial was the same as had been before the court at the first trial. It was dated and signed by a Crown Counsel on behalf of the Attorney-General in pursuance of powers conferred under s. 83 of the Criminal Procedure Code of Kenya (Cap. 27)(hereinafter referred to as "the Code") and had been filed in the registry of the Supreme Court under s. 250 of the Code before the first trial. Following the form prescribed by s. 256 of the Code it originally commenced:

"In Her Majesty's Supreme Court of Kenya at Nyeri.

The 3rd day of May, 1960.

Criminal Case No. 41 of 1960.

At the sessions holden at Nyeri on the 3rd day of May, 1960, the court is informed by the Attorney-General on behalf of Our Lady the Queen that Pyaralal Melaram Bassan and Wathobia s/o Kiambu are charged with the following offence;"

Then followed the statement of offence and particulars of offence in the usual form. At some time before the second trial the passage set out above was amended to read:

"In Her Majesty's Supreme Court of Kenya at Nairobi.

The 6th day of December, 1960.

Criminal Case No. 207 of 1960.

At the sessions holden at Nairobi on the 6th day of December, 1960, the court is informed" etc.,

the remainder of the information remaining in its original form. December 6, 1960, was the date originally set for the re-trial, which was fixed for Nairobi, the subsequent delay being due to the petitions for special leave to appeal to the Privy Council. It was not known who made the alterations in the information, but the information had been in the custody of the Supreme Court throughout, and it seemed probable that the alterations had been made in the Supreme Court Registry. Mr. Shroff did not suggest that the making of the alterations had occasioned any failure of justice such as would exclude the application of s. 381 of the Code, but contended that the making of the alterations was not a formal defect, but rendered the information a nullity; that accordingly there had been no information before the court and the appellants had never been arraigned; and that this was a defect which went to the root of the jurisdiction of the court and was not a defect curable under s. 381 of the Code.

We are satisfied that there is no substance in this ground of appeal. This court ordered a re-trial, that is, a fresh trial on the original information filed by the Attorney-General, and that is in fact what took place. The alterations made were purely formal, obviously made to accord with the new date and place of trial, and in no way affected the charge preferred against the appellants or the conduct of the defence. We were informed from the bar that in practice these dates are left blank when an information is filed by the Attorney-General, and are filled in the Supreme Court Registry when the place and date of the trial has been fixed. However this may be, sub-s. (2) of s. 254 of the Code gives express power to the Supreme Court to

“give such directions for the amendment of the information and the service of any notices which the court may deem necessary in consequence of any order made under sub-s. (1) of this section”.

Sub-section (1) of the section relates to the postponement of the trial of an accused person to a subsequent session in the same or another district. While there is no express provision dealing with the case of a re-trial ordered by an appellate court, we consider that the Supreme Court has inherent jurisdiction to give directions for similar amendments consequential upon an order for a re-trial. In the absence of any indication to the contrary, we assume that the amendments in the instant case were made in pursuance of such directions. We doubt whether, in view of s. 271 (1) of the Code, it is open to the appellants to object to the form of the information at this stage; but even if it is, and the alterations were unauthorised, we do not think they render the information a nullity, but amount to no more than a technical irregularity curable under s. 381 of the Code.

Mr. Shroff's next argument related to Tanganyika's evidence. The relevant grounds of appeal of the second appellant read as follows:

- “6. The learned judge erred in relying on the evidence of Kinyua s/o Njuguna (P.W. 9).
- “7. The learned judge erred in holding that the evidence of Kinyua s/o Njuguna (P.W. 9) was corroborated by the evidence of Stephen Iheri (P.W.11), Ali Bin Asumani (P.W. 16), Thimba (P.W.20), Adijal (P.W.23), Elai (P.W. 24) or the statements made by the appellant to Inspector Harbans Singh (P.W. 26) or Senior Superintendent MacKenzie (P.W. 35).
- “8. The learned judge failed to take into account the inconsistencies in the evidence of Mwangi s/o Kihara (P.W. 10) with other prosecution witnesses and failed to appreciate the effect thereof on the evidence of other prosecution witnesses.
- “9. The learned judge was wrong in holding that the prosecution case was that the first appellant and the second appellant arranged the details of the killing of Satyavati and her children and that pursuant to such plan the first appellant was to drive his wife and children to Nanyuki on the afternoon of March 11 where the first appellant was to pick up the second appellant who would travel on the back of the van and on return to Nyeri at some selected spot the second appellant was to attack and kill Satyavati and her children.”

The corresponding grounds in the first appellant's memorandum of appeal are grounds 3, 6, 8 and 10. It is not necessary to set these out in full.

We were taken in some detail through the evidence given by Tanganyika at the preliminary inquiry, at the first trial, and at this trial. Our attention was drawn to various inconsistencies in his evidence in the different courts, and it was submitted that he was not only an accomplice but also had been described by the prosecution witnesses as a “rogue”. It was submitted that the evidence of the other witnesses called by the prosecution did not provide corroboration for his story and that there was no reliable support for his story other than the statements of the appellants, which were themselves challenged. And it was submitted that the learned judge ought not to have believed Tanganyika and ought not to have found corroboration of his evidence in the evidence of the other witnesses.

We have carefully considered the discrepancies brought to our notice, but have found no reason to disagree with the learned judge that Tanganyika's evidence remained substantially unshaken notwithstanding the most searching cross-examination. The question of credibility of a witness is essentially one

for the trial judge. The learned judge took full account of Tanganyika's character, the discrepancies in his evidence and the strangeness of his story, and nevertheless decided in the light of all the evidence, that he was to be believed, a view which was also held by the assessors. No such misdirection has been brought to our notice as would justify our saying that the learned judge failed to take into account material matters, or had regard to matters which he should have ignored. It is said that in the case of Mwangi, whose evidence the learned judge discarded on account of "a glaring discrepancy" between his evidence at the preliminary inquiry and at the trial, the learned judge should have held that a comparison of Mwangi's rejected evidence with the evidence of Tanganyika detrimentally affected the credibility of the latter and threw doubt on his whole story. It is to be noted that the learned judge did not find that Mwangi was deliberately lying, but that "his recollection at this lapse of time should not be relied upon". However, we were taken through Mwangi's evidence in the three courts in detail, and considered the nature of the discrepancies that appear, and we have concluded that they are not such as to affect to any extent the credibility of the evidence given by Tanganyika. Having held that Tanganyika was to be treated as an accomplice, the learned judge properly looked for corroboration of his evidence implicating the appellants. We think Tanganyika's evidence of the conspiracy to kill the first appellant's family is sufficiently corroborated by the evidence of the several witnesses referred to by the learned judge.

As regards the learned judge's reference to the statements of each appellant providing corroboration as against that appellant of the accomplice evidence given by Tanganyika, it is true that those statements were retracted, but we see no reason why they should not be taken into account as corroboration of Tanganyika's evidence. It is, of course, a well established rule of prudence that it is unsafe to act upon a retracted confession in the absence of corroboration of the confession in a material particular. It is to be noted that in the instant case none of the first appellant's statements amounts to a confession, while only four of the second appellant's statements were held to amount to confessions. It is true that as a general rule evidence which itself requires corroboration cannot provide corroboration for other evidence also requiring corroboration, but retracted statements are not of the same quality as accomplice evidence. We think that a statement made by an accused person, whether amounting to a confession or not, may in a proper case amount to corroboration of accomplice evidence. In *Credland v. Knowler* (4), 35 Cr. App. R. 48, it was held that not only were certain admissions made by the appellant to a police officer, not in themselves inculpatory, strong corroboration of certain prosecution evidence, but that a lie told by the appellant to the police officer was also capable of being corroboration. In the latter connection the Lord Chief Justice said:

"... one has to look at the whole circumstances of the case. What may afford corroboration in one case may not in another. It depends on the nature of the rest of the evidence and the nature of the lie that was told."

In Sarkar on Evidence (9th Edn.) at p. 1089 it is said:

"Retracted confession of an accused may be sufficient corroboration of the approver's story as against himself".

The cases mentioned on which this statement is based are unfortunately not available here, but the statement supports the view we have taken. A similar statement is to be found at p. 149 of the supplement to Woodroffe's Law of Evidence (9th Edn.). In the instant case independent corroboration exists for Tanganyika's evidence on the one hand, and the second appellant's retracted confessions on the other. The confessions were clearly intended by the second

appellant to be exculpatory. That given on the evening of March 16 (exhibit 15) is singularly detailed and tallies closely with Tanganyika's evidence. It seems to us that in the circumstances of this case it can properly be taken into account as corroboration of Tanganyika's evidence. Even without the retracted confessions, however, there was sufficient corroboration of Tanganyika's evidence. Similar considerations apply to the statements made by the first appellant. These statements are exculpatory and have been shown to be largely untrue, but they contain gravely incriminating admissions of association with Tanganyika. We think they also can properly be regarded as corroboration of Tanganyika's evidence as against the first appellant. These grounds of appeal accordingly also fail.

The next head of argument put forward by Mr. Shroff related to Dr. Rogoff's evidence, and the inferences to be drawn from it. The relevant grounds of appeal in the second appellant's memorandum of appeal are grounds 2, 3 and 4, which read:

- "2. The learned judge erred in holding that Satyavati was killed by blows with a panga by the appellant by squatting or kneeling in the tray of the van behind her.
- "3. The learned judge misdirected himself on the standard of proof required in establishing facts by circumstantial evidence.
- "4. The learned judge erred in holding that the appellant was present at and/or took part in the killing of Satyavati."

A somewhat similar ground of appeal appears in the first appellant's memorandum of appeal, that is ground 4 which reads:

- "4. The learned judge erred in holding that the circumstantial evidence established the appellant's implication in the killing of his wife and misdirected himself as to the requisite standard of proof thereof."

This ground was argued separately by Mr. Rao, but we will deal with it together with the second appellant's grounds.

So far as ground 3 of the second appellant's memorandum is concerned, we see no substance whatever in it. The learned judge gave the assessors a very full and correct direction upon circumstantial evidence. In particular, he gave the recognised direction

"that the circumstantial evidence to justify the inference of guilt, must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."

Reading the judgment, it is obvious that he had this principle very much in mind. The real complaint is that the conclusions he drew were not justified by the evidence. As to this, the learned judge's conclusions based on the circumstantial evidence relating to the actual killing, and, in particular, on the evidence given by Dr. Rogoff, were:

- (a) that Satyavati was killed inside the van;
- (b) that Satyavati was killed by blows with a panga or similar weapon by someone squatting or kneeling on the tray of the van behind her;
- (c) that the glass of the windscreen and window was broken after Satyavati and the children had been killed;
- (d) that the first appellant was out of the van when the glass was broken;
- (e) that the first appellant's account of the attack is false; and
- (f) that the first appellant must have connived at the killing.

The first of these findings was not seriously challenged, but the second was, especially by Mr. Shroff, as, if true, it directly affected the second appellant who in his statements had admitted he was in the back of the van. We are satisfied

that the learned judge was fully justified in reaching the conclusion he did on the evidence. We would add that we ourselves viewed the van in the presence of counsel. We were impressed by what we saw, which, we considered, fully supported the learned judge's conclusion. The argument that the fatal blow could have been struck by someone leaning through the driver's door is not consistent with the physical evidence of the direction of the fatal wound, the tears in the roof, or the blood splashes on the roof of the rear of the vehicle.

Mr. Rao attacked the conclusions that the glass of the windows was broken after Satyavati and the children had been killed and the appellant had got out of the car, pointing out that in the photographs of the dead children lying in the car there was no glass on top of them. This may be true, and is a point which does not appear to have been taken in the court below. It weakens to some extent the inference drawn from the fact there was no glass under the bodies, but does not entirely destroy it. The bodies had obviously been shifted somewhat before the photographs were taken. They had been examined at the hospital and the child found to be alive had been removed. Glass on the bodies might well have fallen or been brushed off before the photographs were taken. Superintendent Baker stated there was no glass under the bodies, but was not asked whether there was glass on the bodies. The point, however, is not of vital importance in view of the finding, based on the glass in the driving seat, that the first appellant was out of the car when the glass was broken. The absence of glass on or in the first appellant's clothing is perhaps more equivocal than the learned judge thought, but it is quite impossible to conceive that the glass in the driving seat, referred to by Superintendent Baker and clearly shown in the photographs, could possibly have got there had the first appellant been in the seat when the screen was broken or half-way out of the seat when the window was broken. It is obvious that he must have been out of the car when the glass was broken, and this is the vital matter in view of his statement. This fact, together with the other matters taken into account by the learned judge, such as the nature of the injuries on the first appellant, and the leaving of Satyavati's wrist watch and bangles, do in our opinion lead only to the conclusion that the first appellant's account of the attack is false; and, further, the nature of the injuries on the first appellant indicates positively that he was acting in concert with whoever did the killing. We think therefore that the learned judge's final conclusion was justified; but, in any case, this evidence is not to be considered in isolation, but is to be considered in relation to the evidence as a whole. We think these grounds of appeal also must fail.

Finally, so far as Mr. Shroff's argument is concerned, there is the question of the admission in evidence of the second appellant's statements. The relevant ground of appeal is:

- "10. The learned judge erred in holding that the statements made by the appellant to Inspector Harbans Singh (P.W. 26) and Senior Superintendent MacKenzie (P.W. 36) were admissible."

These fall into two categories—the long statement made to Inspector Harbans Singh on the evening of March 16, and the series of statements made to Superintendent MacKenzie while the appellant was in prison. Objection was taken to all these statements at the trial, the procedure of a "trial within a trial" was duly followed, and in each case the learned judge, in a considered ruling, admitted the statements in evidence. The ruling in respect of the statement made to Inspector Harbans Singh is as follows:

"Ruling

"It is submitted that this statement should not be admitted in evidence in that it was the result of question and answer.

"I am unable, within the four walls of that document, to draw that

conclusion even to the extent of throwing a reasonable doubt on the evidence of Harbans Singh and Ignatius. The accused has not seen fit to make any statement to support his counsel's suggestion to witnesses that the accused was intimidated or ill-treated or that his statement was the result of question and answer. The evidence called by the Crown proves the reverse to be the case.

"Returning to this statement, there is the positive and undisputed evidence, relative to questioning, from Harbans Singh that he did not put questions, from Ignatius that he thought Harbans Singh only asked the accused to repeat something when he, Harbans Singh, could not understand it. The totality of that evidence is clearly that there was no questioning. I hold there to have been no infringement of the judges' rules.

"All the circumstances go to show the voluntary nature of this statement. It will be admitted in evidence."

Mr. Shroff argued, as he had done at the trial, that it was to be inferred from the statement itself that it was made in answer to questions. We agree, however, with the learned judge's view that such a conclusion is not to be drawn from the statement. Mr. Shroff's principal argument before us, however, was that Inspector Harbans Singh was an investigating officer in the case, that as such he ought not to have taken a statement from a suspect, and that accordingly the statement ought to be excluded from evidence; and Mr. Shroff relied strongly on the dictum of this court in *Njunguna s/o Kimani and Others v. R.* (5) (1954), 21 E.A.C.A. 316 at p. 322 that:

"This court has more than once said that it is inadvisable, if not improper, for the police officer who was conducting the investigation of a case, to charge a suspect and record his cautioned statement."

It is to be noted that that dictum relates to the cautioned statement taken upon the charging of a suspect. In the instant case, the appellant was cautioned before making the statement; but the police at that stage were not satisfied with the truth of the story and he was not charged till the following morning. However, Mr. Brookes, for the Crown, drew our attention to the following passage in *Israeli Kamukolse and Others v. R.* (6) (1956), 23 E.A.C.A. 521 at p. 525:

"We have already mentioned that most of the impugned statements were recorded by the investigating officer. The court has more than once said that this practice is inadvisable, if not improper: see *Njuguna and Others* C.A. 549-552 of 1954 (unreported). By ignoring this opinion the investigating officer in the present case has exposed himself to grave allegations of misconduct made both by the appellants and by their advocate".

In the context this seems to suggest that it is improper for any statement to be recorded by an investigating officer. Mr. Brookes contended that both these passages are obiter, as indeed they are, and submitted that they were not good law. He pointed out that there is no reported case, prior to *Njuguna's* case (5), in which it is said that it is improper for an investigating officer to record a suspect's statement.

We certainly do not think that the court in *Njuguna's* case (5), intended to lay down a rule of law that a statement recorded by an investigating officer upon charge and caution of a suspect is to be automatically excluded from evidence. Nor do we think that the court in *Israeli's* case (6), can have intended to say that it is necessarily improper for an investigating officer to take any statement from a suspect. If it did, we must respectfully dissent. There may be

many suspects in the early stages of an investigation into a case, and it is hardly a practicable proposition that a fresh and independent police officer should be procured to take a statement from each.

This court had occasion to consider the application of the judges' rules to extra-judicial statements taken by a magistrate in *Nayinda s/o Batungwa v. R.* (7), [1959] E.A. 688 (C.A.). In the course of the judgment in that case this court cited and relied on passages from the judgments of the Court of Criminal Appeal in England in *R. v. Voisin* (8), [1918] 1 K.B. 531 and *R. v. Bass* (9), [1953] 1 All E.R. 1064, which we think it well to repeat here. The passage from *R. v. Voisin* (8), at p. 537, is as follows:

"It is clear, and has been frequently held, that the duty of the judge to exclude statements is one that must depend upon the particular circumstances of each case. The general principle is admirably stated by Lord Sumner in his judgment in the Privy Council in *Ibrahim v. Rex* as follows:

'It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority'

The point of that passage is that the statement must be a voluntary statement; any statement which has been extorted by fear of prejudice or induced by hope of advantage held out by a person in authority is not admissible. As Lord Sumner points out, logically these considerations go to the value of the statement rather than to its admissibility. The question as to whether a person has been duly cautioned before the statement was made is one of the circumstance that must be taken into consideration, but this is a circumstance upon which the judge should exercise his discretion. It cannot be said as a matter of law that the absence of a caution makes the statement inadmissible; it may tend to show that the person was not upon his guard as to the importance of what he was saying or as to its bearing upon some charge of which he has not been informed."

And the passage from *R. v. Bass* (9), at p. 1065, is as follows:

"There can be no doubt, having regard to that evidence, that the appellant was in custody, that he was questioned without being cautioned, and thus that there was a breach of r. (3) of the judges' rules. If the deputy-chairman had held—as we think he should have done—that the statement was taken in contravention of the judges' rules, it would have been open to him in his discretion to have refused to admit it. On this matter he did not exercise any discretion because, erroneously as we think, he considered the rules had not been contravened.

"That, however, is not an end of the matter, for this court has said on many occasions that the judges' rules have not the force of law, but are administrative directions for the guidance of the police authorities. That means that, if the rules are not complied with, the presiding judge may reject evidence obtained in contravention of them. If, however, as *R. v. Voisin* shows, a statement is obtained in contravention of the judges' rules, it may nevertheless be admitted in evidence provided it was made voluntarily. The principle to be applied was laid down in *R. v. Thompson*, as approved in *Ibrahim v. Regem*. In the latter case, Lord Sumner said ([1914] A.C. 609):

'It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against

him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.’

“It is to be observed, as this court pointed out in *R. v. Murray*, that, while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it the principle as stated by Lord Sumner, and he should further tell them that, if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it.”

This court continued:

“We are not to be taken as minimising the importance of compliance by police officers with the judges’ rules. Failure to comply with the judges’ rules when taking a statement from a prisoner will, no doubt, usually result in the rejection of the statement as evidence by the judge presiding at the trial. But it must be kept in mind that the judges’ rules are administrative rules, and that breach of them does not automatically result in the exclusion of a statement. The breach is but one of the circumstances, though an important one, for the trial judge to take into account in deciding whether or not the statement was voluntary, or was made in circumstances which render it unfair to the prisoner that it should be admitted in evidence.”

We think that that passage correctly states the law in relation to statements made to a police officer where such statements are admissible in evidence by the law of the territory concerned. We think the dicta in *Njuguna’s* case (5), is to be read in the context of the facts of that case, which were particularly bad. The accused person there had been in police custody, apparently illegally, for a matter of two months before making the statement in question. It is obviously a matter of prudence for an investigating officer, if he can, to avoid himself charging a suspect and recording his statement. The dangers of doing so are stressed in the passage from *Israeli’s* case (6), set out above. The fact that a statement, whether on charge and caution or otherwise, has been recorded by the investigating officer in the case is, no doubt, a matter for the trial judge to consider in deciding whether or not to admit the statement in evidence, but the fact, in itself, does not automatically result in the exclusion of the statement from evidence.

So far as the second appellant’s statement to Inspector Harbans Singh in the instant case is concerned, none of the objectionable features of *Njuguna’s* case (5), was present. The appellant does not allege any improper conduct on the part of Inspector Harbans Singh. We see no reason to interfere with the exercise of the learned judge’s discretion in admitting the statement.

The statements made to Superintendent MacKenzie are somewhat unusual. The second appellant at the time was in prison, not police, custody. Superintendent MacKenzie had come into the matter on instructions to investigate allegations of ill-treatment in prison made by the appellant. He was not an investigating officer in the case, though as second in command of the police in the province he had attended conferences in relation to the case. After his investigation of the allegation of ill-treatment, the second appellant on various occasions asked to see him personally, and at these interviews made the various statements which were admitted in evidence, each after caution. The second appellant alleged that he was induced to make these statements by promises of release. The learned judge rejected this allegation and we see no reason to

disagree with him. We think he was fully justified in holding that the statements were voluntary, and admitting them in evidence.

It follows that we see no reason to interfere with the conviction of the second appellant and his appeal is accordingly dismissed.

In addition to the grounds of appeal with which we have dealt, Mr. Rao, for the first appellant, also argued ground 9 and grounds 11 and 12 in the first appellant's memorandum of appeal.

Ground 9 relates to two statements made by the first appellant and reads:

"9. The learned judge erred in finding that the statements exhibits 13 and 14 were voluntary and in admitting them."

As we have already indicated, these statements are exculpatory, but contain admissions going far beyond the first account given by the first appellant: in particular, admissions of having been party to arrangements with Tanganyika on several occasions for Tanganyika to frighten Satyavati, and of being a party to such an arrangement on the occasion of the killing. The first of the statements now objected to was made at 11.45 p.m. on March 16, 1960, to Superintendent Baker, the investigating officer in the case. Superintendent Baker gave evidence to the effect that though at that stage he had received Tanganyika's and the second appellant's stories he had not accepted them as true as he was aware of the character of those two individuals. He had, however, been questioning the first appellant about certain discrepancies in his account of the affair. Thereafter, after an interval of about half an hour during which some tea was taken by the police officers present and by the first appellant, the first appellant stated that he wished to tell the truth. He then commenced the statement, exhibit 13. After some eight lines, Superintendent Baker realised the statement was of an incriminating nature, and administered a caution, though not one in the usual form. The learned judge in a written ruling carefully considered the evidence and concluded that the statement was entirely voluntary. However, he excluded that part of the statement given before the caution on the ground that the first appellant might have been under the impression that he was in custody. The learned judge continued:

"That somewhat technical objection however, is removed as from the time Superintendent Baker decided to, and did, caution this accused. While his caution was not, in so many words, in the form in police use, I am satisfied that it complied in its essential ingredients and brought to the attention of this accused clearly the fact that any further statement he volunteered could be used against him. This caution in my view removed any suggestion that what accused then volunteered was anything other than voluntary in the full sense and spirit of that term. It is for comment that the accused himself has not said that this statement was not voluntary. I therefore hold the portion of this statement made after caution to be admissible in evidence."

Before us Mr. Rao contended that the caution was inadequate and for that reason the whole of the statement should have been excluded. We see no reason, however, to disagree with the learned judge that the caution was sufficient to put the first appellant on his guard. As the learned judge remarks, it is to be noted that the appellant himself did not say the statement was not voluntary. We do not think the learned judge exercised his discretion on any wrong principle in admitting in evidence that portion of the statement which followed the caution.

The second statement to the admission of which objection is taken, i.e. exhibit 14, was recorded at 1 a.m. on March 17, 1960, after a formal caution, when the first appellant, after a further interval, had stated that he wished to make a clean breast of it. Mr. Rao objected to the learned judge's finding that

the appellant was not tired when he made the statement, but his principal objection was to the fact that the statement was taken by Superintendent Baker who was the investigating officer. We have already dealt with the question of statements taken by investigating officers. In the particular circumstances of this case we see no reason to conclude that the statement is not admissible merely from the circumstance that it was recorded by the investigating officer. It is to be noted that at that stage the police, though beginning to be suspicious, had not decided to charge the first appellant. So far as tiredness was concerned, the evidence supported the learned judge's finding. In any case tiredness in itself is not a ground for concluding that a statement is not voluntary; though there might be circumstances in which a trial judge might decide that such a factor rendered the admission of a statement unfair to an accused. This would be a matter for the discretion of the trial judge. We do not think the circumstances in this case were such that the learned trial judge ought to have excluded the statement, even if he had concluded that the appellant was tired. We therefore think that ground 9 of the first appellant's memorandum of appeal must fail.

Grounds 11 and 12 of the first appellant's memorandum read as follows:

"11. The learned judge erred in attaching the significance to the presence of the wrist watch and bangles on the body of the deceased.

"12. The learned judge erred in convicting the appellant on the evidence before him."

Ground 11 is really covered by ground 4, with which we have already dealt. We think the fact that the wrist watch and bangles of Satyavati were not removed was a factor of some significance which the learned judge was entitled to take into account in considering the circumstantial evidence.

So far as ground 12 is concerned, taking the evidence as a whole, we are satisfied that the conviction of this appellant was fully justified.

The appeal of the first appellant accordingly also fails and is dismissed.

Appeal dismissed.

For the first appellant:

SS Rao

For the second appellant:

Hoshang Shroff

For the respondent:

KC Brookes (Crown Counsel, Kenya)

For the first appellant:

Advocates: *Shretta & Rao*, Nairobi

For the second appellant:

Hoshang Shroff, Nairobi

For the respondent:

The Attorney-General, Kenya

R v Ali Selemani
Application by A N Hirji
[1961] 1 EA 538 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment: 5 May 1961
Case Number: 45/1961
Before: Sir Ralph Windham CJ

[1] Criminal law – Practice – Fine – Levy of fine upon property of accused – Order for seizure and sale of vehicle – Proceeds to be put towards fine – Vehicle not owned by accused – Accused hiring under hire-purchase agreement – Application by owner of vehicle – Time for appeal by applicant expired – Applicant unaware of court order – Practice to be adopted in such a case – Criminal Procedure Code, s. 296, s. 297 and s. 312 (T.).

Editor's Summary

S. was convicted of the theft of a lorry and was sentenced to imprisonment for two years and a fine of Shs. 2,583/-. The magistrate further ordered that if the fine was not paid within thirty days a lorry which S. had agreed to purchase under a hire-purchase agreement should be seized and sold and that, after deducting the balance due to one, Hirji, the vendor under the agreement, the balance should be put towards the fine. Hirji who was not a witness in the proceedings, applied to the court for revision of the magistrate's order on the ground that he did not become aware of the court order for seizure and sale of the lorry until after the period within which he could appeal as a person aggrieved under s. 312 of the Criminal Procedure Code had expired. He claimed to be aggrieved by the order as he stated he was the owner of the lorry which he had agreed to sell upon hire-purchase terms to S. who had defaulted.

Held –

- (i) the applicant's proper remedy was to give written notice of objection to the attachment of the lorry under s. 297 of the Criminal Procedure Code; such notice can be given at any time prior to the receipt by the court of the proceeds of sale of the attached property.
- (ii) confirmation of the sentence by the High Court did not preclude the applicant from instituting objection proceedings under s. 297 of the Criminal Procedure Code upon an order made in revision.

Order varied and suspended for one week to enable the applicant to institute objection proceedings and if such proceedings are so instituted the order to be further suspended until the determination of the proceedings.

Case referred to:

- (1) *Lobozi s/o Katabaro v. R.* (1956), 23 E.A.C.A. 583.

Judgment

Sir Ralph Windham CJ: An accused person, hereinafter referred to as the accused, was convicted on January 21, 1961, of the theft of a lorry, and was sentenced to imprisonment for two years and a fine of Shs. 2,583/-. Acting presumably under s. 296 (1) of the Criminal Procedure Code, the trial magistrate made a further order in the following terms:

“If the fine is not paid within thirty days then I order that lorry DSS 947 shall be seized and sold and after deducting the balance of the hire-purchase of £700 to be paid to A. N. Hirji the balance should be put towards the fine.”

The said Mr. Hirji, hereinafter referred to as the applicant, was not a witness in the proceedings. He has stated through his counsel, and his statement stands uncontradicted, that he did not become aware of the order for the seizure and sale of the lorry until February 25, by which time the period within which, as a person aggrieved, he had a right of appeal against the order under s. 312 of the Criminal Procedure Code had expired. He claims to be aggrieved by the order because, he states, he is the owner of the lorry, having sold it to the accused upon a hire-purchase agreement on which the accused defaulted. Section 296 (1) of the Criminal Procedure Code empowers the court to order a fine to be levied only on the property of the person fined, who in the present case was the accused. The applicant contends that the lorry was not the accused's. I am informed from the bar that the lorry has not yet been sold.

In these circumstances the applicant's proper remedy would seem to be to give written notice of objection to the attachment of the lorry under s. 297 of the Criminal Procedure Code. Such notice may be given at any time prior to the receipt by the court of the proceeds of sale of the attached property. Under s. 297 the court which ordered the attachment may, for the purpose of investigating the objection, hear evidence regarding the ownership of the property. That court, indeed, is a more appropriate forum than this court for the taking of such evidence.

It has been pointed out, as being an obstacle to this procedure, that on January 30, 1961, the sentences passed on the accused were confirmed by a judge of this court; and on the assumption that this confirmation includes the order for attachment and sale of the lorry, which I incline to think it does, it is contended that this precludes the applicant from any remedy save an application to this court to interfere by way of revision, such as he has made, followed by the taking of evidence by this court, on the question of ownership of the lorry; and in particular it is contended that it precludes him from resorting to s. 297 of the Criminal Procedure Code.

I do not think that is so. In *Lobozi s/o Katabaro v. R.* (1) (1956), 23 E.A.C.A. 583, the Court of Appeal for Eastern Africa considered the question of what powers remained to the High Court to interfere, on appeal or in revision, with a sentence that had been passed in a magistrate's court and confirmed by a judge of the High Court, and they held that there was nothing to preclude interference on appeal. With regard to revision, they simply observed that:

"save in cases where justice requires that an obviously improper conviction or illegal sentence be at once quashed or rectified, revisional powers should not be exercised before inquiry has been made whether an appeal has been or is likely to be lodged."

This passage takes it for granted that this court has power, in its revisionary jurisdiction, to interfere with a sentence that has been confirmed by a judge of this court.

In the present case the time for appealing has expired, and I am satisfied that it had already expired when the applicant first came to know of the attachment order on the car that he claims to be his property. I am satisfied that the confirmation of the sentence by the High Court does not preclude the applicant from instituting objection proceedings under s. 297 of the Criminal Procedure Code, upon an order of this court in revision. I consider that my powers in revision are sufficiently wide to enable me to make the order that I hereby make; namely: (a) the order regarding the attachment of the lorry, that is to say from the words—"If the fine is not paid" to the words "put towards the fine" shall be suspended for a period of one week from today, to enable the applicant to institute objection proceedings in the court below under s. 297 of the Criminal Procedure Code; (b) if such proceedings are so instituted within the said week, then the said order shall be further suspended until the

determination of those proceedings, when the court below will either confirm or vary or revoke its said order, in accordance with its decision regarding the ownership of the lorry.

Order varied and suspended for one week to enable the applicant to institute objection proceedings and if such proceedings are so instituted the order to be further suspended until the determination of the proceedings.

For the applicant:

BN Patel

For the Crown:

AM Troup (Crown Counsel, Tanganyika)

For the applicant:

Advocates: *Baloo Patel & Co*, Dar-es-Salaam

For the respondent:

The Attorney-General, Tanganyika

**Parbat VG Meghji and another v The Attorney-General
of Kenya**

[1961] 1 EA 540 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	31 July 1961
Case Number:	25/1961
Before:	Sir Alastair Forbes V-P, Sir Trevor Gould JA and Mayer J
Appeal from:	H.M. Supreme Court of Kenya—Miles, J

[1] *Immigration – Dependant’s pass – Dependant’s pass issued on application by resident – Death of resident before dependant’s arrival in Kenya – Whether dependant’s entry and stay in Colony lawful – Immigration (Control) Ordinance (Cap. 51), s. 5, s. 6 (1) and (2) and s. 15 (K.) – Immigration Control Regulations, reg. 21 (2) (K.) – Immigration (Control) (Exemption) Regulations, reg. 3 (1) (d) (K.) – Immigration Ordinance, 1956, s. 7, s. 8 and s. 19 (K.) – Immigration Regulations, 1957, reg. 28 – Civil Procedure (Revised) Rules, 1948, O. VI, r. 7 (K.).*

[2] *Statute – Repeal – Regulations made under statute – Statute and regulations repealed – Whether vested rights acquired under repealed regulations continue – Immigration (Control) (Exemption) Regulations, reg. 3 (1) (d) (K.) – Interpretation and General Provisions Ordinance, 1956, s. 23 (3) (c) (K.).*

Editor's Summary

In 1954, when the appellants were at school in India, their father who was in Kenya applied for and obtained dependant's passes for them under reg. 21 (2) of the Immigration (Control) Regulations made under the Immigration (Control) Ordinance. The appellants arrived at Mombasa in August, 1955, unaware that their father had died in July and that by his death the basis for the grant of dependants' passes, namely, the residence of their father in Kenya and their dependency on him, had ceased to exist. The appellants took no steps to regularise their position and in February, 1958, they were convicted on their own pleas of guilty of being unlawfully within the Colony contrary to s. 15 (1) (i) of the Immigration Ordinance 1956, which came into force on July 1, 1957, repealing the Immigration (Control) Ordinance and the regulations made there-under including the Immigration (Control) (Exemption) Regulations. Having failed to obtain class "G" or class "D" permits they then applied under the Immigration (Control) (Exemption) Regulations for exemption certificates which were also refused. The appellants subsequently sued for a declaration that their entry and stay in the Colony was lawful by reason of reg. 3 (1) (d) of the Immigration (Control) (Exemption) Regulations but the declaration was

refused. On appeal it was submitted that on entry into the Colony the appellants had a vested right to exemption notwithstanding that the Exemption Regulations had been revoked by virtue of s. 23 (3) (c) of the Interpretation and General Provisions Ordinance, 1956.

Held –

- (i) while not deciding whether the dependant's passes issued were or were not valid, even if the appellants' entry on those passes was legal, the passes ceased to authorise the appellants' presence in Kenya immediately upon their entry.
- (ii) the application of s. 23 (3) (c) of the Interpretation and General Provisions Ordinance, 1956, was excluded by the specific provisions contained in s. 19 (v) of the Immigration Ordinance, 1956.
- (iii) exemption from the provisions of s. 6 of the Immigration (Control) Ordinance was only conferred in relation to reg. 3 (1) (d) of the Immigration (Control) (Exemption) Regulations, if the principal immigration officer had been satisfied that the necessary conditions precedent existed or it had been held on appeal that such conditions existed.
- (iv) the critical time under s. 19 (v) of the Immigration Ordinance, 1956, was July 1, 1957, the date of commencement of that Ordinance, and as no attempt had been made at that date to satisfy the principal immigration officer the necessary exemption could not exist.

Appeal dismissed.

Cases referred to:

- (1) *Keshavlal Punja Parbat Shah v. The Superintendent of H.M. Prison, Nairobi, and Another* (1955), 22 E.A.C.A. 218.
- (2) *Somchand Narshi Shah v. Chimambhai Motibhai Patel and Others*, [1961] E.A. 397 (C.A.).
- (3) *Lancaster (John) Radiators Ltd. v. General Motor Radiator Co. Ltd.*, [1946] 2 All E.R. 685.

Judgment

Sir Alastair Forbes V-P: read the following judgment of the court:

This was an appeal from a judgment and decree of the Supreme Court of Kenya dismissing with costs the appellants' prayer for a

"Declaration that the plaintiffs' entry and stay in the Colony is lawful as they were exempt at the time of their entry from the provisions of s. 6 of the Immigration (Control) Ordinance, 1948, then in force in the Colony by virtue of reg. 3 (1) (d) of the Immigration (Control) (Exemption) Regulations, 1948, in force at the time of the plaintiffs' entry into the Colony and as such the plaintiffs continue to be so exempt till the judgment of this court and thereafter."

After hearing counsel for the parties we dismissed the appeal with costs. We now give our reasons.

The following statement of the facts is taken from the judgment of the learned trial judge:

"The plaintiffs in this case claim a declaration that their entry and stay in the Colony is lawful by reason of reg. 3 (1) (d) of the Immigration (Control) (Exemption) Regulations, 1948. The defendant is sued as representing the principal immigration officer under s. 12 (1) of the Crown Proceedings Ordinance, 1956. The

plaintiffs who are respectively about

twenty-three and twenty-one years of age are the sons of one Visram Govind, who died on July 23, 1955. At the time of his death he was a retired Government servant on pension. He had resided in the Colony some twenty to twenty-five years. In the year 1954 the deceased applied to the principal immigration officer for a dependant's pass in respect of the plaintiffs who were at the time at school at the Government School at Chundri, Cutch, India. These passes were duly issued.

"The two plaintiffs travelled separately by boat from India and arrived at Mombasa on August 18 and 28, 1955, respectively, the second plaintiff arriving first. I am satisfied that the plaintiffs left their abode in India before they knew of their father's death and that the first they heard of it was when they arrived at Mombasa; but they apparently took no steps to regularise their position and in the year 1957 it was brought to the notice of the plaintiffs that they were unlawfully in the Colony and on February 1, 1958, they were convicted in the resident magistrate's court at Mombasa of the offence of being unlawfully present within the Colony contrary to s. 15 (1) (i) of the Immigration Ordinance, 1956, and were each fined Shs. 100/-. They in fact pleaded guilty to this charge. I attach no importance to this since the plaintiffs were young at the time and had no legal advice. Following this conviction the plaintiffs were advised to apply to the principal immigration officer for a class 'G' permit.

"For this purpose they were granted special passes. The applications were duly made but were unsuccessful. The special passes expired on July 18, 1958. Later they applied for a class 'D' permit which was also refused. An application was then made by Messrs. Bhandari & Bhandari for an exemption certificate under the Immigration (Control) (Exemption) Regulations, 1948, but this again was unsuccessful."

The learned judge further noted that it was conceded by the respondent that the appellants' father, Visram Govind, had he been alive would have been entitled, on application, to be granted a permanent resident's certificate; and that both appellants were of good character.

At the time of the appellants' entry into Kenya the Immigration (Control) Ordinance (Cap. 51 of the 1948 Revised Edition of the Laws of Kenya) was in force. Sub-section (1) of s. 6 of that Ordinance provided:

"6 (1) No person to whom this section applies shall enter the Colony unless he is—

- (i) in possession of a valid entry permit issued to him under the provisions of sub-s. (1) of s. 7 of this Ordinance, or his name is endorsed upon a valid entry permit in accordance with the provisions of s. 8 of this Ordinance; or
- (ii) in possession of a valid pass to enter the Colony, issued to him under the provisions of any regulations made under this Ordinance."

Sub-section (2) of s. 6 specifies the classes of person to whom the section does not apply. It is not relevant in this case.

The Immigration (Control) Regulations made under the Immigration (Control) Ordinance provided, *inter alia*, for the:

"kinds of passes which may be issued to a person entitling such person to enter and remain temporarily within the Colony",

including the "dependant's passes" which were issued to the appellants. Sub-regulation (2) of reg. 21 provided:

“(2). A dependant’s pass shall entitle the person in respect of whom such pass is issued to enter the Colony within the period stated in such pass and to remain therein for such time only as:

- (a) the resident upon whose application such pass has been issued remains a resident of the Colony; and
- (b) such person remains a dependant of such resident.”

As to the legality of the appellants’ entry on the dependant’s passes issued to them, the learned trial judge said:

“I am inclined to think that on the death of the father, the basis for the grant of a dependant’s pass, namely, residence in the Colony and dependency, having ceased to exist, the pass ceased to be valid. I express no concluded opinion on the point because I am satisfied that even assuming the lawfulness of the plaintiffs’ original entry Mr. Bhandari’s second argument fails.”

We agree that the decision of the case does not depend on the validity of the dependant’s passes issued to the appellants, and would merely note that even if their entry on those passes was legal, the passes ceased to authorise the appellants’ presence in Kenya immediately upon their entry. Section 15 of the Immigration (Control) Ordinance provided that it should be unlawful for any person to remain in the Colony after, *inter alia*, expiration of any pass issued to him unless he was otherwise entitled or authorised to remain in the Colony under the provisions of the Ordinance or the regulations made thereunder.

The appellants, however, relied on reg. 3 of the Immigration (Control) (Exemption) Regulations (hereinafter referred to as “the Exemption Regulations”) also made under the Immigration (Control) Ordinance. The material part of the reg. 3 of the Exemption Regulations is para. (d) of sub-reg. (1) which reads as follows:

“3 (1) The following persons shall be exempt from the provisions of s. 6 of the Ordinance—

.....

- (d) any person who satisfies the principal immigration officer that—
 - (i) he is the child of a permanent resident of the Colony, or
 - (ii) he is the child of a person who, it is reasonable to assume, would, if still alive, have been a permanent resident of the Colony, and
 - (iii) he has been undergoing a course of education outside the Colony at one or more universities, colleges, schools or similar institutions,and who enters the Colony within one year after the completion of such course of education.”

Sub-regulation (5) of reg. 3 provided for an appeal to the Supreme Court by any person aggrieved by a decision of the principal immigration officer under, *inter alia*, para. (d) of sub-reg. (1) of the regulation.

The Immigration (Control) Ordinance was repealed, together with the regulations made thereunder, by s. 19 of the Immigration Ordinance, 1956 (hereinafter referred to as “the 1956 Ordinance”) which came into force on July 1, 1957, and is still in force. The proviso to s. 19 provides, *inter alia*:

- “(i) any person whose presence in the Colony was unlawful under the provisions of the said Ordinance or any regulations made thereunder shall be deemed to have been, and, unless and until his presence in the

Colony is expressly authorised by or under this Ordinance or any regulations made thereunder, to be, unlawfully in the Colony for the purposes of this Ordinance and any regulations made thereunder:

.....

- (v) any person who lawfully entered the Colony before the commencement of this Ordinance in virtue of an exemption granted by or under sub-para. (d), (e) or (f) of para. (1) of reg. 3 of the Immigration (Control) (Exemption) Regulations made under the said Ordinance (and now revoked), and whose presence in the Colony was still lawful in virtue of such exemption immediately before the commencement of this Ordinance, shall be deemed to be the holder of a certificate of exemption issued under regulations made under this Ordinance. . .”

Part VI of the Immigration Regulations, 1957, made under the 1956 Ordinance, makes provision corresponding in some measure to r. 3 of the Exemption Regulations for the issue of certificates of exemption, but the appellants do not qualify under it.

The learned judge held that under r. 3(1) (d) of the Exemption Regulations a person claiming exemption must make application therefor to the principal immigration officer. He said:

“Regulation 3 (1) (d) of the Immigration (Control) (Exemption) Regulations, 1948, does not specify any mode of application to the principal immigration officer. There is no ‘prescribed form’ of application nor is there any ‘prescribed form’ for indicating the ‘satisfaction’ of the principal immigration officer. I understand that in practice an ‘exemption certificate’ is issued. When these particular Regulations are read as a whole, however, it is clear in my opinion that there must be an application made to the principal immigration officer and a ‘decision’ by him. This view is reinforced by the right of appeal to the Supreme Court conferred by sub-r. 5.

“The Regulations do not confer an absolute right to the exemption. The principal immigration officer has to be satisfied as to the facts.”

We respectfully agree. Unless and until an application had been made to the principal immigration officer it was impossible for such officer to be “satisfied”. In the absence of any provision as to the method of application, it may be that an oral application would have sufficed. But no application was in fact made until long after the revocation of the Exemption Regulations, and that application was refused. The reason for the refusal does not appear from the record, but it may well have been on the ground that the Regulations were no longer in force.

Mr. Bhandari for the appellants submitted that on entry the appellants had a vested right to exemption which continued, notwithstanding the revocation of the Exemption Regulations, by virtue of s. 23 (3) (c) of the Interpretation and General Provisions Ordinance, 1956. The relevant part of sub-s. (3) of that section reads as follows:

- “(3) Where a written law repeals in whole or in part any other written law, then, unless a contrary intention appears, the repeal shall not:

.....

- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed;”.

In our view, however, that provision does not apply. The right to remain in Kenya is now governed by the Immigration Ordinance, 1956, and in para. (v)

of s. 19 that Ordinance makes specific provision in respect of persons admitted to the Colony by virtue of the Exemption Regulations. In our judgment that specific provision excludes the operation of s. 23(3) (c) of the Interpretation and General Provisions Ordinance, 1956, even if that section would otherwise be applicable, which we doubt. Exemption from the provisions of s. 6 of the Immigration (Control) Ordinance was only conferred by reg. 3 of the Exemption Regulations if, in the case of paras. (d), (e) and (f), the principal immigration officer had been satisfied that the necessary conditions precedent existed or it had been held on appeal that such conditions existed. The critical time under para. (v) of s. 19 of the 1956 Ordinance is the date of commencement of that Ordinance. At that date, no attempt had been made by the appellants to satisfy the principal immigration officer, so the necessary exemption could not exist. It is, perhaps, not irrelevant to note that under the corresponding provisions of the Immigration Regulations, 1957 (Part VI, reg. 28) the course of education or training outside the Colony on which an application for a certificate of exemption is based must immediately precede the application. It would seem improbable that the legislature intended to confer exemption on persons who had never made application under the Exemption Regulations owing, apart from other matters, to the lapse of time between the course of education relied on and the date of application.

Mr. Bhandari relied before us, as he had done before the Supreme Court, on the dicta of this court in *Keshavlal Punja Parbat Shah v. The Superintendent of H.M. Prison, Nairobi, and Another* (1) (1955), 22 E.A.C.A. 218 at p. 226, that:

“If a man has been a good citizen of Kenya for some years he should not be deprived of his rights of permanent residence, whether matured or almost matured, merely because of a late-discovered, and perhaps purely technical, objection to the manner of his original entry”.

That comment, however, was made in relation to the provisions of the Immigration (Control) Ordinance, and, in particular, to sub-s. (3) of s. 5 of that Ordinance. That sub-s. provided:

“(3). Any person who has entered the Colony whether before or after the commencement of this Ordinance who, at any time before the expiration of four years of such entry, is found by the principal immigration officer to have been a prohibited immigrant under the law in force at the time of his entry shall be deemed to have been one at the time of such entry.”

On the facts in that case the court held that the permission granted under the Immigration (Control) Ordinance to the appellant to enter the Colony, though obtained through innocent misrepresentation, was valid until revoked, and, as the appellant had, before revocation, completed the period of residence necessary to qualify him for the status of permanent residence, it was then too late to revoke the permission to enter and to deport the appellant. Since the date of that decision, however, the 1956 Ordinance has come into force, and that Ordinance contains very different provisions, in particular s. 8, which reads as follows:

“8. Any entry permit, pass, certificate or other authority, whether issued, granted or conferred under this Ordinance or under any regulations made thereunder or under any other law for the time being in force, whether or not since repealed, which is or was obtained by, or is or was issued, granted or conferred as a result or by reason of, fraud, or misrepresentation or concealment or non-disclosure, whether intentional or inadvertent, of any material fact or circumstance, shall be and be deemed always to have been null, void and of no effect.”

In view of that section, and the provisions of s. 7(1) and 7(2) (j) of the 1956 Ordinance, it may be doubted whether the dicta referred to now has any validity. In any event, we were satisfied that on the facts of this case the decision of the court in *Keshavlal's* case (1) could not assist the appellants.

Finally, we would refer to ground 2 of the memorandum of appeal, which reads as follows:

“2. During the course of the hearing the learned judge gave the following ruling:

‘Paragraph 7 of the defence does not specifically deny the allegation that the plaintiffs had been undergoing a course of education outside the Colony etc., but on that the principal immigration officer was satisfied thereof. Paragraph 11 of the defence is not sufficient to comply with O. VI, r. 7.’

The appellants would contend that in view of this ruling the learned judge is deemed to have held that the onus lying on the appellants of ‘satisfying’ the principal immigration officer was discharged and he should not have allowed any evidence from the respondents which was inconsistent with the pleadings and ruling above quoted.”

Mr. Bhandari appeared to place some considerable reliance on this ground of appeal, but, with respect, it is misconceived, and, in any case, the learned judge’s ruling is incorrect. The ruling as quoted in the memorandum of appeal follows the wording of the ruling as it appears in the certified typescript copy of the proceedings in the Supreme Court and, though it is obviously ungrammatical in this form, Mr. Bhandari seems to have read it as a ruling that on the pleadings the principal immigration officer must be held to have been satisfied that the appellants had been undergoing a course of instruction outside the Colony. Besides being ungrammatical, such a ruling would be incompatible with the contents of para. 7 of the defence. On reference to the original record it is clear that the word “on” should read “only”, and we pointed this out to Mr. Bhandari. This, of course, gives the ruling the opposite sense to that upon which Mr. Bhandari relied. Apart from this, the learned judge’s ruling that “Paragraph 11 of the defence is not sufficient to comply with O.VI, r. 7” (of the Civil Procedure (Revised) Rules, 1948) is, with great respect, wrong. Paragraph 11 of the defence is a denial, in the usual form, and in support of other more specific pleadings, of

“each allegation of fact contained in the plaint. . . as though herein set out and traversed seriatim”.

In *Somchand Narshi Shah v. Chimanbhai Motibhai Patel and Others*, (2) [1961] E.A. 397 (C.A.) this court held, following *Lancaster (John) Radiators Ltd. v. General Motor Radiator Co. Ltd.* (3), [1946] 2 All E.R. 685, that such a denial is valid and effectual. We would add that the attention of the learned judge was not drawn to the *Lancaster Radiators* case (3), and, of course, the decision of this court in the *Somchand Narshi Shah* case (2) was subsequent to the learned judge’s ruling.

Appeal dismissed.

For the appellants:

MK Bhandari

For the respondent:

JS Rumbold (Crown Counsel, Kenya)

For the appellants:

Advocates: *Bhandari & Bhandari*, Nairobi

For the respondent:

Mrs Lachabai Murlidhar v Radhakrishen M Khemaney
[1961] 1 EA 547 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 23 May 1961
Case Number: 72/1960
Before: Sir Kenneth O'Connor P, Gould JA and Sir Owen Corrie Ag JA
Appeal from: H.M. Supreme Court of Kenya—Pelly Murphy, J

[1] Fatal accident – Damages – Application of principles on which damages are assessed in fatal accident cases – Issues to be tried – Determination of issues by appellate court – Fatal Accidents Ordinance (Cap. 9) (K.)

Editor's Summary

The appellant claimed damages from the respondent for herself and her husband's dependants, in respect of the negligence of the respondent which caused her husband's death in a motor accident. The Supreme Court found that the respondent was negligent and awarded the appellant £6,625 damages. Both parties having appealed on the question of damages only, the Court of Appeal set aside the judgment so far as damages were concerned and ordered that that issue be re-tried. The Privy Council subsequently dismissed a further appeal but set aside the order of the Supreme Court on costs which it held should be left to the next court of trial. At the re-hearing evidence was given by five witnesses including the appellant and the accounts of the business in which the deceased had been engaged were produced by the auditors but the books of the business were not produced. The trial judge framed no issues and in his judgment he rejected the accounts produced as being almost worthless. He held it was for the appellant to prove her loss, that she had failed to do so, had withheld material which was relevant and that on the evidence available he could not arrive at any decision apart from assessing £1,080 per annum as being the amount of the dependency, i.e. the extent of the benefits received by the deceased's dependants at the time of his death. He accordingly dismissed the appellant's claim with costs and awarded the costs of the first trial to the respondent. The appellant thereupon appealed attacking the trial judge's assessment of the dependency and his findings that the evidence was inadequate and that the appellant should have led evidence to show whether the deceased was extravagant.

Held –

- (i) the Judicial Committee did not express the view attributed to the Privy Council by the trial judge that all the available relevant material which would elucidate the matters to which they had referred should be produced by the appellant.
- (ii) the balance sheets and accounts which the judge had rejected as worthless had been certified by professional auditors and it was unlikely that inspection by the judge of the original account books would have discovered anything which had escaped the vigilance of the auditors.

- (iii) the matters to be taken into account in assessing damages in a similar case had been set out in the judgment of the Judicial Committee in *Nance v. British Columbia Electric Railway Co. Ltd.*, [1951] A.C. 601 at p. 615 and applying these principles the judgment of the Supreme Court should be set aside and judgment entered in favour of the appellant for Shs. 197,880/- general damages.

Appeal allowed. Judgment for the appellant for £9,894 general damages.

[Editorial Note: This case is reported to illustrate the practical application by the court of the principles upon which damages are assessed in claims

resulting from fatal accidents. See also *Mrs. P. F. Hayes and Another v. C. J. Patel and Another*, [1961] E.A. 129(K.).]

Case referred to:

(1) *Nance v. British Columbia Electric Railway Co. Ltd.*, [1951] A.C. 601; [1951] 2 All E.R. 448.

May 23. The following judgments were read:

Judgment

Sir Owen Corrie Ag JA: This is an appeal from the judgment dated June 30, 1960, of the Supreme Court of Kenya in a suit brought by the appellant, the widow of Murlidhar Doulatram Mahbubani, who at the time of his death was the manager of the Mombasa branch of the firm of B. Choitram, claiming damages against the respondent, on her own behalf and on that of her husband's dependants, under the Fatal Accidents Ordinance (Cap. 9) for negligence which caused his death on July 1, 1956.

A preliminary objection by the respondent as to time was over-ruled and an application by the appellant for completion of the record was allowed; the costs in each case being reserved.

When the suit came before the Supreme Court in 1957 the court found that the respondent was guilty of negligence and awarded the appellant £6,625 (Shs. 132,500/-) general damages with costs.

Against this judgment both parties appealed to this court. There was no appeal on the question of negligence and the only matter in dispute was the quantum of damages.

This court made the following order:

“That the judgment and decree of the Supreme Court, so far as it relates to the assessment of the total sum of general damages, be set aside, and that issue be re-tried. The dismissal of the claim for special damages should stand, and also the order for apportionment of general damages in the sense that, whatever sum is awarded on the re-trial, should be divided in the same proportions and between the same persons as previously ordered. As regards costs, the order for costs of the original trial should stand. Both the appeal and the cross-appeal were partly successful and partly unsuccessful, so no order is made as to the costs in this court. The costs of the re-trial will, of course, be in the discretion of the judge.”

On appeal to the Judicial Committee of the Privy Council, their lordships ordered:

- “(1) that this appeal ought to be dismissed and the order of the Court of Appeal for Eastern Africa dated the 23rd day of May, 1958 varied by setting aside that part thereof dealing with the costs of the hearing before the said Supreme Court;
- “(2) that the part of the order of the said Supreme Court dated the 30th day of July, 1957 dealing with such costs also be set aside, and
- “(3) that a fresh order as to the said costs ought to be made by the next court of trial.”

The suit accordingly went back to the Supreme Court for re-hearing.

The matters to be taken into account in assessing damages in a similar case were set out in the judgment of the Judicial Committee in *Nance v. British Columbia Electric Railway Co. Ltd.*, (1) [1951] A.C. 601 at p. 615:

“Supposing, by this method, an estimated annual sum of S_y is arrived at as the sum which would have been applied for the benefit of the plaintiff for x more years, the sum to be awarded is not simply S_y multiplied by x , because that sum is a sum spread over a period of years and must be discounted so as to arrive at its equivalent in the form of a lump sum payable at his death as damages. Then a deduction must further be made for the benefit accruing to the widow from the acceleration of her interest in his estate on his death intestate in 1949 . . . and a further allowance must be made for a possibility which might have been realised if he had not been killed but had embarked on his allotted span of x years, namely, the possibility that the wife might have died before he did. And there is a further possibility to be allowed for—though in most cases it is incapable of evaluation—namely, the possibility that, in the events which have actually happened, the widow might remarry, in circumstances which would improve her financial position.

“A figure having been arrived at under this first head, there should be added to it a figure arrived at under the second head. The question there is what additional amount he would probably have saved during the x years if he had so long endured, and what part, if any, of these additional savings his family would have been likely to inherit.”

No issues were framed at either hearing before the Supreme Court but following *Nance’s* case (1) it appears that the issues to be tried were:

- (1) The period for which the dependants might have hoped to enjoy benefits from the deceased if he had not been killed;
- (2) the amount of the dependency, that is to say the extent of the benefits received by his dependants from the deceased, Murlidhar, at the time of his death;
- (3) whether or not it would have been necessary for the deceased owing to his extravagance to reduce the amount of such dependency and the amount (if any) of such reduction; this rather unusual issue arose from the evidence at each trial;
- (4) the amount of the estate (if any) of which the deceased died possessed;
- (5) the benefit accruing to the dependants from the accelerated receipt of such estate;
- (6) the amount to which, in consequence of such accelerated receipt, the loss occasioned to the dependants owing to the deceased’s death was reduced;
- (7) the present value of the amount (if any) which the deceased might have saved had he not died in the accident;
- (8) the total loss suffered by the dependants being the amount of damages payable by the respondent;
- (9) the apportionment of the damages between the dependants;
- (10) the liability for the costs of the original trial in Supreme Court, and
- (11) the costs of the re-hearing.

On the other issues, except those of costs, the learned judge found himself unable on the evidence before him to arrive at any decision. His judgment concludes as follows:

“All available relevant material has not been placed before me. On the contrary, the most relevant material has been withheld. Such evidence as the plaintiff has adduced at this trial is so unsatisfactory that I am unable

even to guess what was the true financial position of the deceased at the time of his death.

“It was for the plaintiff to prove the amount of the pecuniary loss she had suffered as the result of her husband’s death. She has failed to prove facts on which damages can properly be estimated. No one other than the plaintiff can properly be penalised for this failure. For these reasons the plaintiff’s claim for damages is dismissed with costs.

“As to the costs of the first trial, I am satisfied that the absence of relevant material was the fault of the plaintiff and I award the costs of that trial to the defendant.”

The learned judge had before him the evidence of the appellant herself, of Ramchand Bheroomal Choitram, a partner in the firm of B. Choitram and brother of the appellant, of Meghji Rupa Shah and of Hubert Richard Brice, the two last-named witnesses being called on behalf of the respondent.

There was also read to the court the evidence given at the first trial before the Supreme Court by Doulatram Bheroomal, the senior partner in the firm of B. Choitram.

The court also had before it copies of trading accounts and balance sheets of the Dar-es-Salaam branch of B. Choitram certified by Mehta Patel & Company, accountants and auditors, for the years 1947 to 1956, and copies of the balance sheets of the Nairobi branch of B. Choitram for the years 1948 to 1958, audited by the firm of accounts in which the witness, Mr. Brice, was the senior partner.

That the learned judge with this material before him was unable to come to any conclusion upon the other issues to be tried seems surprising. His inability to do so appears to have been caused by the fact that the books of account of the Nairobi and Dar-es-Salaam branches of B. Choitram were not produced although he had ordered the witness Ramchand Bheroomal Choitram to produce the Nairobi books. The reason given for their non-production was that they were in the custody of Doulatram, who at the time of the trial was in India. With regard to the balance sheets, the learned judge said,

“On all the evidence I have no hesitation in finding that the balance sheets are of no value in so far as they purport to show the earnings of the deceased. I am doubtful if they are of any value in so far as the true financial position of any of the partners is concerned”.

I am unable to take this view. The balance sheets in evidence are certified by professional auditors; and I find it unlikely that the court, by inspecting the original account books, would be able to discover anything which had escaped the vigilance of the auditors by whom the copy accounts put in evidence were certified.

Moreover, counsel appearing before this court clearly did not share the view of the learned trial judge as to the worthlessness of these balance sheets, as each in turn subjected them to a detailed and exhaustive analysis and drew conclusions from them.

On behalf of the respondent, it is true that Mr. Bryson laid great emphasis on the fact that the original Nairobi account books had not been produced. Although he did not say so expressly, I understood him to suggest that the accounts put in evidence had been prepared for the purpose of this suit. Clearly, however, that suggestion could only apply to accounts prepared after the deceased’s death, but these are sufficiently connected with the accounts of earlier years to make it in my view unnecessary to consider that suggestion, which is supported by no evidence except the absence of the Nairobi account books.

It follows that it is now the duty of this court to determine, on the basis of the accounts submitted and of the evidence before and findings of the court of trial, the answers to the issues which I have already set out.

On the first issue, it was held at the original trial in the Supreme Court that the duration of dependency should be taken to be fifteen years: this has not been challenged and I accept that finding.

On the second issue, the extent of the benefits received by his dependants from the deceased, the learned trial judge has made a finding. He has assessed them at £1,080 per annum.

In relation to this finding the appellant has submitted the following grounds of appeal:

1. The learned trial judge erred in law and on the evidence in holding that the value of the benefits received by the deceased's dependants during his life time was approximately £1,080 per year.
2. The learned trial judge should have considered the value of the said dependency immediately prior to the death of the deceased and should have found the same to be not less than £2,150 per year.

In her evidence the appellant in fact stated:

"The deceased used to give me in 1955 Shs. 2,500/-, in 1956 Shs. 3,500/- for all household expenses".

The learned trial judge, however, having gone in some detail into the appellant's household expenses, was not prepared to accept her evidence on this point as being accurate. The grounds on which the learned trial judge arrived at his assessment are to some extent conjectural and his reasons for rejecting the plaintiff's evidence are not in all respects correct, but I think that I should accept his finding on this issue which is, in the main, supportable. I would, therefore, dismiss the appeal on this point.

The third issue relates to the allegation of extravagance on the part of the deceased. Upon this issue, and indeed upon all the issues raised, the learned trial judge has held that the burden of proof was upon the appellant. He states

"Their Lordships of the Privy Council and their Lordships of the Court of Appeal obviously contemplated that at the re-trial evidence would be adduced by the plaintiff which would elucidate the matters to which they specifically referred".

This view is disputed by the appellant.

The third ground of appeal is—

"The learned trial judge erred in law in holding that it was incumbent on the appellant to lead any evidence on the issue whether the deceased was extravagant, and in failing to hold that the burden of proof on this issue rested upon the respondent and that, in absence of any evidence on that issue, no deduction on account of alleged extravagance ought to be made."

In my opinion, this submission is well founded. In the judgment of the Judicial Committee their lordships said

"But in order that conjecture may be reduced to a minimum all available relevant material should be placed before the court of trial including if possible the evidence of an 'actuarial nature' referred to by the learned trial judge".

It is thus clear that their lordships did not express the view that all the available relevant material should be produced by the appellant. It is clearly to the

respondent's advantage to satisfy the court that the deceased was extravagant and as to the extent of his extravagance. In the course, however, of the trial it would appear that sufficient material had been placed before the court, and it is now for this court to decide whether or not the respondent's contention as to the deceased's extravagance is well founded. For this purpose the court has to determine the amount of the deceased's income at the time of his death and the extent of his drawings.

For the appellant, Mr. O'Donovan has submitted that at the time of his death the deceased was in enjoyment of an income of over £5,000 a year made up as to £3,000 of his salary as manager of the Mombasa branch of B. Choitram, and as to the remainder, of income from his savings. For the respondent, Mr. Bryson contested these figures. The deceased's salary at the time of his death was not admitted by Mr. Bryson but I see no reason to discredit the audited accounts and the evidence on the matter; there is, however, a question as to the income derived by the deceased from his other sources. According to Mr. O'Donovan, the deceased was entitled to a sum of Shs. 75,000/- from the Dar-es-Salaam Branch in which he was a partner. This is contested by Mr. Bryson, but I am of opinion that the accounts support Mr. O'Donovan's claim, and show beyond doubt in my opinion that over the years 1951–55 the deceased derived by way of interest as profit from that partnership an average of Shs. 30,000/- per annum. According to the partnership agreement in evidence this partnership was due to terminate six months after his death. As appears from my observations on the next issue, I have come to the conclusion that the net value of the deceased's property at the date of his death was £3,070, which at five per cent would produce an income of £153 per annum, making his total income £3,153 per annum, even allowing for the surrender of the partnership in Dar-es-Salaam.

Turning to the question of drawings, I find that the deceased drew—

in 1955	Shs. 75,119/-
in 1956	Shs. 36,075/-
	<hr/>
	Shs. 111,194/-
	<hr/>

that is £5,559. From this it would appear that during the eighteen months immediately preceding his death the deceased's drawings had averaged £309 a month, i.e. £3,708 per annum. This amount did not exceed what he was earning during the subsistence of the Dar-es-Salaam partnership, but would have done so when that partnership terminated (neither counsel suggested that it would have been renewed) and it is only to be inferred that he would have had to reduce the rate of his expenditure. It must, however, be noted that the deceased's income even then would have been nearly three times the amount which he allowed to his dependants, and I see no reason to hold that a reduction in his total expenditure would involve any reduction in his allowance to them.

I hold, therefore, that no deduction from the dependant's benefits need be made on the ground of the deceased's extravagance.

The fourth issue is as to the value of the property of which the deceased died possessed. On this issue the burden of proof must lie upon the appellant, the facts being assumed to be within her knowledge and not within that of the respondent. The Estate Duty accounts sworn by the appellant show the deceased's

assets to have been as follows:

Share in partnership of the firm, B. Choitram, Dar-es-Salaam	Shs. 88,744/-
Capital amount due from the firm, B. Choitram, Dar-es-Salaam	Shs. 75,000/-
	<hr/>
	Shs. 163,744/-
	<hr/>

less monies drawn by the deceased from the Nairobi branch and amount due for income tax, Shs. 102,341/-, giving a net value of the estate of Shs. 61,403/-, that is £3,070.

Mr. Bryson pointed out that the estate duty accounts do not include items such as a diamond ring which the deceased owned or his clothing, but it is not suggested that these would make any substantial addition to the value of the estate.

The fifth issue is as to the benefits accruing to the dependants from the accelerated receipt of the deceased's estate. Taking simple interest at five per cent., the present value of any sum payable after a period of fifteen years is four-sevenths of that sum; hence the present value of the deceased's estate of £3,070 if payment were deferred for 15 years is £1,754. It follows that the benefit accruing to the dependants from the accelerated receipt of the estate is £1,316.

The sixth issue is as to the total amount to which the benefits received by the dependants is reduced.

The annual dependency being £1,080, the present value of that sum paid annually for 15 years, according to the table given at p. 1046 of Whitaker's Almanack for 1961, is $10.38 \times £1,080$, that is to say, £11,210. Deducting from this the benefit from the accelerated receipt of the deceased's estate, £1,316, leaves a balance of £9,894, that is Shs. 197,880/-.

The seventh issue is as to the present value of such savings as the deceased might be expected to have made had he not died in the accident. This obviously rests entirely upon conjecture. At the time of his death the deceased was tending to over-spend his income; and although from the accounts which have been put in it appears that he had been improving his financial position earlier, I am not prepared to hold that he would have altered his manner of life to the extent of making any material savings.

I would therefore order that the judgment of the Supreme Court dated June 30, 1960 be set aside and that judgment be entered in favour of the appellant for Shs. 197,880/- as general damages.

In *Nance's* case (1) their lordships mentioned, as one of the matters to be taken into account, the possibility of the widow's re-marriage. This would appear to require a very delicate calculation, involving not only the ascertainment of the lady's age and the extent of her property but also an assessment by the Court of her personal attractions.

It is fortunate, therefore, that in the instant case the question of the appellant's re-marriage has never been raised, and it was in fact stated by counsel for the appellant that a Hindu widow may not remarry.

In its previous judgment the court held that the general damages should be divided in the same proportions and between the same persons as previously ordered by the Supreme Court; and this was confirmed in the judgment of the Privy Council. By the Supreme Court's first judgment the general damages were divided into fifty-three parts. It follows that the general damages are now to be allotted as follows:

Grandfather	1	part
Father's estate	2	parts
Mother	2	"
Widow	28	"
Arjan	5	"
Usha Devi	5	"

Hiro	5	”
Ashok	5	”

The tenth issue concerns the costs of the original trial in the Supreme Court. A considerable part of the proceedings in that court was devoted to determining whether or not the respondent was guilty of negligence; and the court so found and ordered the payment of general damages to the appellant.

Some blame, however, is attributable to the appellant for having failed to produce at that trial evidence concerning the termination of the Dar-es-Salaam partnership. I would order that the appellant have three-quarters of her costs of the original trial.

The costs of the second trial in the Supreme Court should be paid by the respondent, and also the costs of this appeal, other than those incurred in respect of a preliminary objection taken by the respondent and a preliminary application by the appellant, the costs of which in each case should be paid by the appellant.

Sir Kenneth O'Connor P: I agree. There will be an order as proposed by the learned Acting Justice of Appeal.

Gould JA: I also agree and have nothing to add.

Appeal allowed. Judgment for the appellant for £9,894 general damages.

For the appellant:

BO'Donovan QC and JK Winyak

For the respondent:

JEL Bryson and KC Thakkar

For the appellant:

Advocates: *Winyak & Johar & Co*, Nairobi

For the respondent:

Patel & Thakkar, Mombasa

James Olinga v R
[1961] 1 EA 555 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	27 November 1961
Case Number:	36/1961
Before:	Sir Audley McKisack CJ

[1] *Criminal law – Corruption – Ingredients of offence – Penal Code, s. 78 (1), s. 79, s. 80 (U.).*

Editor's Summary

The appellant, a clerk in the veterinary department, was convicted of corruption by a public officer, contrary to s. 78 (1) of the Penal Code. The appellant's duties included writing out application forms for cattle traders' licences in cases where the applicant was illiterate. The evidence showed that the appellant had demanded payment of Shs. 30/- before carrying out his duty in respect of the complainant. On appeal it was submitted that the facts did not show that the appellant had agreed to show undue favour to the complainant and that an agreement or offer to show undue favour is an essential component of the offence.

Held – for a public officer to say that he will not carry out a duty without a bribe is equivalent to saying that the conduct of his office will be influenced by the bribe; if the public officer takes or accepts the bribe (or the promise of a bribe), his act would fall within s. 79, but, whether he receives the bribe or promise of the bribe or not, his act is also within s. 78 of the Penal Code.

Appeal dismissed.

No cases referred to in judgment

Judgment

Sir Audley McKisack CJ: disposed of one ground of appeal and continued: The other ground of appeal against the conviction is that the facts which the magistrate found proved do not constitute a contravention of s. 78 (1) of the Penal Code (under which the appellant was charged). Mr. Clerk says that the facts do not show that the appellant agreed to show undue favour to the complainant, and that an agreement or offer to show undue favour to the complainant, and that an agreement or offer to show undue favour is an essential component of the offence defined in this section. That the magistrate was alive to this aspect of the matter is apparent from the following passage in his judgment–

“The charge is one of corruption under s. 78 (1) of the Penal Code. The substance of it is not that the accused agreed to show undue favour to the complainant Kalidi Oluba in exchange for the promise of reward, but that he demanded payment of Shs. 30/- to himself before he would carry out what it was his duty to carry out, namely the completion of a form of application for a cattle trader's licence on behalf of the complainant who could not write, examination of the form and, if appropriate, certification on it of approval on behalf of the Veterinary Officer, Mr. Smith.”

It is argued, however, that a mere demand of payment to do what is one's duty is not sufficient to bring the offender within s. 78 (1). Mr. Clerk points to s. 79, which relates to a person taking or accepting a reward beyond his proper pay for the performance of his duty, and he says that this is what the prosecution was really alleging. But I think that the construction urged by Mr. Clerk is too narrow a one to put on s. 78. For a public officer to say that he will not carry out a certain duty without a bribe appears to me to be equivalent

to saying that the conduct of his office will be influenced by the bribe. If he in fact takes or accepts the bribe (or the promise of a bribe), his act would fall within s. 79; but, whether or not he receives the bribe or promise of the bribe, his act is also within s. 78. I am strengthened in this view by the fact that s. 80 of the Code expressly refers to a public officer showing favour, whereas neither s. 78 nor s. 79 has any mention of showing favour. There is, therefore, in my opinion, good ground for saying that an offer “to be influenced” does not necessarily import an offer to show favour. And, even if I thought otherwise, I would go further and say that, if a public officer says he will do certain acts for a man who pays him, and will not do it for others who fail to pay him, then this amounts to an offer to show favour to that man.

Appeal dismissed.

For the appellant:

AV Clerk

For the respondent:

SWW Wambuzi (Crown Counsel, Uganda)

For the appellant:

Advocates: *Mayanja & Clerk & Co*, Kampala

For the respondent:

Director of Public Prosecution, Kampala

Parke Davis & Co Ltd v Opa Pharmacy Ltd
[1961] 1 EA 556 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	13 October 1961
Case Number:	27/1961
Before:	Sir Alastair Forbes V-P, Sir Trevor Gould and Crawshaw JJA
Appeal from:	H.M. High Court of Uganda–Sir Audley Mckisack, C.J

[1] *Passing off – Ointment sold under trade name – Competitor selling similar ointment with similar name – “Capsolin” and “Capsopa” – Similarity of cartons – Whether public likely to be confused.*

[2] *Passing off – Damages – Delay in taking proceedings – Nominal damages.*

Editor’s Summary

The appellant company had for twenty-eight years sold in East Africa tubes of ointment packed in

distinctive cartons under the registered trade name “Capsolin”. In 1955 the respondent company began selling a similar ointment under a registered trade name “Capsopa”. In 1959 the appellant company sued claiming an injunction to restrain the respondent company from passing off its product as that of the appellant company and damages or an account of profits made. The trial judge dismissed the suit finding *inter alia* that there was no evidence of confusion among the public despite the concurrent sale of the two products and that “Capsopa” was not likely to be confused with “Capsolin”. On appeal

Held –

- (i) since the first two syllables in the trade name used by each of the parties were identical and there were resemblances in the containers there was a real probability of confusion and the appellant company was entitled to an injunction.
- (ii) there was evidence that a substantial part of the respondent company’s sales might have resulted from causes other than deception and bearing in mind the delay before action was taken the appellant company was only entitled to nominal damages.

Appeal allowed. Injunction granted and £50 damages.

Cases referred to:

- (1) *Payton & Co. Ltd. v. Snelling, Lampard & Co. Ltd.*, [1901] A.C. 308.
- (2) *Baume & Co. Ltd. v. A. H. Moore, Ltd.*, [1958] 2 All E.R. 113.
- (3) *Pritchard & Constance (Wholesale) Ltd. v. Amata Ltd. and Others* (1925), 42 R.P.C. 63.
- (4) *Marengo v. Daily Sketch and Sunday Graphic Ltd.* (1948), 65 R.P.C. 242.

October 13. The following judgments were read by direction of the court.

Judgment

Crawshaw JA: This is an appeal from a decision of the Chief Justice of Uganda dismissing the plaintiff/appellant company's claim with pharmaceutical products, had at the date of the plaint, November 23, 1959, been marketing in Uganda over a period of twenty-eight years an ointment having the registered trade name "Capsolin" and sold in a tube contained in a carton of distinctive appearance. In 1955 the respondent company commenced the sale in Uganda of an ointment very similar to that sold by the appellant company and obtained registration of the trade name "Capsopa" in respect thereof; originally the ointment was manufactured to its order in England, and more recently by the respondent company in Uganda. The appellant company complained that in using this name and in using cartons which it is alleged are similar in size and get-up to those used by the appellant company, the respondent company was passing off its ointment for that of the appellant company, it being likely that members of the public would be confused thereby. The appellant company prayed that an injunction be granted restraining the respondent company from passing off its ointment as that of the appellant company; that the respondent company's stock of cartons and ointment tubes be delivered up for destruction; and for damages or an account of profits.

The respondent company in its written statement denied that the size and get-up of their cartons was in any way similar to that of the appellant company's or that the carton and use of the word "Capsopa" was likely to or had in fact caused confusion in the mind of the public, but did not deny the allegation in the plaint that the word "Capsolin" had become and was well known to the public in Uganda as denoting the ointment manufactured and sold by the appellant company. The word "Capsolin" is made up of "caps" being the first four letters of the main ingredient, "capsicum", and "lin" to denote "liniment", the nature of the ointment. The first four letters of "Capsopa" are similarly derived, the second syllable "opa" being a part of the name of the respondent company.

No evidence was produced by the appellant company of any specific instance of confusion or mistake having been experienced by a customer. Mr. R. C. Patel, a director of the respondent company, said that he knew of no such occurrence and three shopkeepers were called by the respondent company who said likewise. Mr. Reynolds, who has represented the appellant company in East Africa since the beginning of 1955, said, however, that in 1956 and 1957 the sales of "Capsolin" were lower than in 1955 and that from 1958 they slumped considerably. The figures of sales which he gave were—

1955	61,400	tubes
1956	39,500	"

1957	48,500	”
1958	24,000	”
1959	14,200	”
1960	18,000	”

It is not quite clear from the evidence, but these figures may refer to the whole of East Africa. The evidence of Mr. R. C. Patel was not quite so precise, but he said that in 1956 and 1957 the respondent company sold about 12,000 to 18,000 tubes. He went on to say, "When we moved into Tanganyika about April 1958 the sales became 18,000 to 24,000", and "We sell in Kenya too", although he did not say when sales in Kenya commenced. He said that in 1959 not more than 24,000 tubes were sold, and that he had not got the figures for 1960. He said that in 1954 the respondent company obtained registration of "Opa" in a triangle, and that it uses the word "Opa" in some of its specifics, but not others.

The learned Chief Justice said,

"I think it highly significant that there has been no evidence of confusion in respect of either class of customer despite the concurrent sale of these two products over a number of years".

The two classes of customers he had in mind were those who bought by the trade name, and those who accepted the advice of the shopkeepers. He found that there was very little similarity between the respective tubes in which the ointment was contained, and I find no difficulty in agreeing with him on that. As to the respective cartons, he said,

"So far as the get-up is concerned, I find that 'Capsopa' is not likely to be confused with 'Capsolin'".

He was clearly referring to the cartons in use by the respondent company up to 1959, during which year the respondent company changed the colour and design of their cartons, to bring it in line, R. C. Patel said, with their other products. I have no doubt that, apart from the names, there could be no confusion between the respondent company's new cartons and those of the appellant company. With regard to the original cartons of the respondent company, there is certainly more similarity. It is to be observed, although no submission has been founded thereon, that sales of "Capsolin" have gone up in 1960 since the cartons were changed, comparable figures for "Capsopa" not being available.

The grounds of appeal are that the learned Chief Justice erred in not finding the name "Capsopa" and the use of the cartons by the respondent company had caused and were likely to cause confusion in the mind of the public, and in not finding that the respondent company was passing off its ointment for that of the appellant company. It has not been suggested by either party that the fact of registration of the trade marks is material in a passing-off action, nor is it, but Mr. James, who appeared for the respondent company, has attached significance to the appellant company having made no objection to the registration when it took place in 1955. Nor has it been suggested, I think, that the appellant company was unaware of the application for registration, or of the marketing of "Capsopa" from the beginning, yet the first complaint of passing-off was made by the appellant company to the respondent company in March, 1959. Mr. James has submitted that the true reason for the passing-off action is the falling sales of "Capsolin", and that the reason for the falling sales is the price differential, "Capsopa" being cheaper than "Capsolin". Mr. Wilkinson, who appeared for the appellant, has pointed out that loss of trade, or anticipated loss, is the common factor in passing-off actions and of course this must be so. The substance of Mr. James's submission is, however, as I understand it, that had the appellant company truly believed that the trade names and get-up of the cartons were likely to cause confusion in the mind of the public, one would have expected the appellant company to have asked for an injunction much sooner than they did, instead of allowing the two commodities to be sold side by side for some four years before making complaint. There is certainly some force in this argument.

Mr. James has conceded that it is not necessary to prove that any person has in fact been deceived, although proof thereof might assist the court, but here again he says that over a period of four years one would have expected some such instance to have arisen which would have been available to the appellant company. Mr. Wilkinson submits that it is very seldom that such evidence can be obtained and I can well understand that there might be difficulty in this respect. Kerly on Trade Marks (8th Edn.) p. 422, says:

“Proof of actual deception, if the mark is in the opinion of the tribunal likely to deceive or if it has been substantially copied from another, is unnecessary.

“If one or more cases of actual deception are made out to the satisfaction of the court, this will, of course, afford very strong evidence that the resemblance of the marks in question is so close as to be likely to deceive. But the absence of evidence of actual deception is a circumstance which varies greatly in weight according to the nature of the case. It can never be conclusive by itself. But where the marks have been circulating side by side in the market where deception is alleged to be probable, the fact that no one appears to have been misled is very material”

unless otherwise explained.

Both counsel have expressed the difficulty they have been under in the presentation of their cases through not having available to them in Uganda most of the reported cases on passing-off. The learned Chief Justice must have been under the same disability. The majority of cases are to be found only in Reports of Patent Cases to many of which reports this court also has no access. Certain of the witnesses for the respondent company expressed the view that in the instant case the public would not be deceived, but such evidence is not a matter for independent opinion, it is a question of fact for the court itself to decide (*Payton & Co. Ltd. v. Snelling, Lampard & Co. Ltd.* (1), [1901] A.C. 308). Kerly at p. 421 has, by reference to cases not available to us, given instances of the type of evidence by which a court should be guided, such as evidence that there has been no confusion, evidence of the circumstances usually attending distribution and sale of the goods under consideration, of the type of customer and of the degree of discrimination commonly portrayed, expert evidence as to the circumstances usually attending the sale of goods in the particular trade, and as to the ordinary class of customers served, their intelligence and education, what they particularly look for in purchasing the plaintiff's goods, and, if the goods are sold abroad, their knowledge of the meaning of English words in the marks, and such-like matters.

In the instant case, the respondent company in its written statement of defence admitted para. 5 of the plaint, which reads:

“The plaintiff has for twenty-eight years sold the ointment through its agents in Uganda, in a distinctive red and yellow carton with the word ‘Capsolin’ printed thereon. The said ointment is largely sold to the African population of Uganda.”

The evidence of the respondent company's witnesses would seem to confirm that the sales were largely to Africans, though some to Indians and, so far as is known, to members of other communities also. At the time “Capsopa” was introduced, the respondent company was itself retailing “Capsolin” also. It is not suggested that the appellant company had any exclusive right to compound an ointment of the ingredients concerned. As to the circumstances commonly attending the sale of the ointments, R. C. Patel said that the purchasers usually accepted his recommendation, which naturally, as he says, would be the respondent company's “Capsopa”, and that anyway they preferred it as being

cheaper than “Capsolin”; he says that normally they looked inside the carton before deciding. Joshi, a shopkeeper, who gave evidence for the respondent company, said that customers did not normally ask for goods by name but consulted him, and that he usually recommended “Capsopa” as he made more profit on it. C. Patel and J. B. Muradas, two other shopkeepers, both said, however, that customers ask for what they want by name, the former saying, “They don’t look round and select”. These two witnesses also appeared to think that the lower price of “Capsopa” influenced the sales. “Capsolin,” it seems, sold at Shs. 3/- per tube. R. C. Patel said “Capsopa” was retailed at Shs. 2/- per tube, but C. Patel and Muradas said they sold it at Shs. 2/50. On this question of price, it is pertinent to observe, as Mr. Wilkinson points out, that taking into consideration the respective sizes of the tubes, “Capsolin” is probably no more expensive than “Capsopa”, for the “Capsolin” tubes would appear to be about one-third larger. At the same time it may be of course that many people would prefer less quantity at a lower price.

The learned Chief Justice said:

“it was in evidence that before deciding to buy, the customer would usually take the precaution of opening the carton and looking at the tube”.

The evidence, however, shows the experience of the witnesses to have been different as to this—those who did look at the tube could hardly have been deceived. Comparing the original “Capsopa” cartons with the “Capsolin” cartons, the learned Chief Justice said:

“I do not consider that there is any high degree of similarity in appearance and that one was not likely to be confused with the other, even although some of the customers may be illiterate and would be guided by the general appearance of the cartons rather than by the words. The names ‘Capsolin’ and ‘Capsopa’ respectively in part make up the general appearance for they appear on the cartons of both parties in large letters. In considering similarity of the cartons one has, as Mr. Wilkinson said, to regard them not necessarily as to how they would compare if seen together, but on whether a person who had seen one might subsequently mistake the other for it. I must say that on mere inspection of the cartons together I should have been inclined to have taken the same view as did the learned Chief Justice, but there are overall similarities in general appearance which, especially on the sales figures since the respondent company’s change in design, leave me in some doubt whether confusion may not have arisen in the past and arise in the future; there may be other explanations for the figures, and I shall be referring to this later. The cartons, however, are of nearly the same size, and whereas the background of one is mostly red, that of the other is maroon; on both, the respective, and very similar, names appear in large lettering contained in a frame; and the ends are yellow. There are many details of difference, such as in the smaller writing, which do not, however, materially affect the overall appearance.”

The chief similarity, however, occurs in the two names, and the question is whether they are likely to be confused by members of the public. The learned Chief Justice said, “There is certainly a similarity between the two names”, but in coming to the conclusion that there was not sufficient ground for saying that they were so close as to justify the complaint of passing-off he said he had regard:

“to the component parts of those names, to the fact that ‘Capsopa’ incorporates the firm name of its manufacturer, to the different terminations, and to the difference in pronunciation”.

I think, with the greatest respect, that little if any weight can be given to pronunciation for, although a witness for the appellant company in cross-examination said, “‘Capsolin’ is so pronounced and ‘Capsopa’ has accent on the second syllable”, he was presumably referring to the English pronunciation, and it does not mean that Africans, for instance, who are the principal buyers, or Indians, would be likely to pronounce the words in that way, as Mr. James admitted. The words could well be pronounced in a non-accented or differently accented manner which would make them sound even more similar than when pronounced in the normal English way. It is probable some persons would pronounce them one way and some another.

Again, with respect, I do not think in the circumstances of this case it is really material to the question of passing-off how the component parts of the words are made up, although it may be material in considering whether there was intent to deceive. There may be many persons who would be so familiar with “Opa” products that they would at once be put on their guard, but there is no evidence how extensively known these products were in East Africa and here again one has to bear in mind the type of persons who normally purchase the ointment. The fact that “Opa” is part of the respondent company’s name is not sufficient if the whole word is likely to deceive. In *Baume & Co. Ltd. v. A. H. Moore Ltd.* (2), [1958] 2 All E.R. 113, where the defendant’s name was incorporated separately, and therefore more obviously, in the trade name it was held:

“no man was entitled, even by the honest use of his own name, so to describe or mark his goods as in fact to represent that they were the goods of another person”.

Mr. Wilkinson has submitted, and quite justifiably in my opinion, that the first syllable “Caps” would be unlikely to be associated by members of the public with the ingredient capsicum, a substance which it is improbable most Africans would anyway have heard of. Capsicum appears in full as an ingredient on the tube of “Capsolin” and abbreviated to “capsic” on the tube of “Capsopa” but not on the cartons, and at least it would be unusual for a layman to peruse the list of ingredients. There is evidence of another stimulant called “Capshine” which also contains capsicum, but I do not think that the evidence leads one to the conclusion that any of these names should be regarded as descriptive in the sense that “Caps” or “Capso” had come to be known as descriptive of the main ingredient capsicum, or as common to the trade. Without becoming so known, “Caps” in itself is patently insufficient to denote capsicum. Furthermore, it was not pleaded that the names were descriptive or common to the trade.

The termination of the two words is different, but Mr. Wilkinson submits that a study of the English cases shows that chief importance is attached to the similarity of the first or first two syllables. In the instant case the first two syllables are the same, and in cross-examination R. C. Patel himself said, “The important parts of the names are the first four letters”. Mr. Wilkinson has given a number of examples taken from Kerly at p. 429 et seq. illustrating instances in which the first part of the words is similar but the terminations different, where the court has found infringement; Mr. James has similarly referred to cases where the names have been held not to infringe, and has submitted that cases can be found to support a submission either way. As Mr. James quite rightly says, a court must decide on the particular facts before it. Material considerations can arise apart from the mere look and sound of the names, and although it is interesting to peruse the list of names given in Kerly, it would, I think, be dangerous to draw any general or particular conclusion therefrom without studying the reasons advanced for the decision in each individual case.

If the names are held not to be descriptive I find myself unable to come to any other conclusion than that there is insufficient distinction between them to avoid confusion. A shopkeeper tells a customer he has two liniments, “Capsolin” and “Capsopa”, and I think it is very possible that the customer, who has previously used, or been recommended by a friend, “Capsolin”, may, if he has but an ordinary memory, be uncertain which it was. If in doubt, he might certainly be influenced by the price and buy “Capsopa”, although if certain which was which, he might prefer to pay the larger price for “Capsolin”. It is further in evidence that if the customer expressed no definite preference (and this he could not do if he was confused as to which was the appellant company’s ointment) the shopkeeper would recommend “Capsopa” as he obtained more profit on it or, in the case of the respondent company’s own retail shop, because it was their own commodity. In *Prichard & Constance (Wholesale) Ltd. v. Amata Ltd. and Others* (3) (1925), 42 R.P.C. 63, Mr. Justice Romer, as he then was, had to consider whether the defendants’ trade name “Amata” was likely to be confused with the plaintiffs’ trade name “Amami”, both relating to toilet and perfumery preparations. Holding that it did, he said at p. 70:

“Further than that, it appears that the people to whom the plaintiffs’ goods have been recommended or who have seen the plaintiffs’ goods advertised, go into a chemist’s shop with a very imperfect recollection of the name of the goods they have seen advertised, or which have been recommended, and sometimes they would come in and say: ‘Now I want — I forget its name, but it begins ‘Am’ something’. The chemist, there being only at present one manufacturer of these toilet preparations bearing a name which begins with ‘Am’, has very little difficulty in saying, in answer: You mean ‘Amami’, the plaintiffs’ production.

“On the other hand, what I have to consider is this: If and when ‘Amata’ toilet preparations are put on the market, and an intending buyer of ‘Amami’ preparations comes into a shop which stocks ‘Amata’ preparations she may well have in her mind an imperfect recollection of the name of the goods that have been recommended to her or that she has seen advertised. Seeing ‘Amata’ preparations being offered for sale she is very likely to assume without further inquiry that those are the preparations that she requires. For it must be remembered that the plaintiffs’ name ‘Amami’ is a fancy word, not an English word; therefore, it is a word as to which it is quite likely that persons who have seen the advertisements, or had the plaintiffs’ goods recommended to them, would retain a very imperfect recollection.

“It is said by the defendants that they ought not to be restrained from selling their preparations as ‘Amata’ or ‘Amata’ simply because people will not take the trouble to remember what is the real name attached by the plaintiffs to their goods; but if every customer had a perfect memory of trade names or trade marks, I take it, that apart altogether from cases where the court is dealing with similarity of get-up, an injunction would never be granted to restrain the use of a trade name, however similar the trade name of the defendants to that of the plaintiffs, unless the trade name were identical. In all these cases which come before the courts the court is proceeding upon the assumption that customers do retain a normally imperfect recollection of the plaintiff’s trade name and will make mistakes if the defendant’s trade name is similar to that of the plaintiff’s.

“Now, it is said by the defendants here that, if I restrain the use of the word ‘Amata’ or ‘Amata’ as applied to toilet preparations, I should equally have to restrain the use of every other word that begins with the

letters 'A m a'. I do not think that that follows at all. When a person with an imperfect memory of the real name of the plaintiffs' goods comes in and recollects nothing more than, say, that it begins with the letters 'A m' or the letters 'A m a', if the chemist were to say: 'Oh, are you thinking of "amazement?"' or some well-known English word like that, the customer would say: 'No, it is not that; the word I am thinking of is a fancy word; it is a name I do not know'; but if the chemist should say: 'Was it "Amata" or "Amata"? I think it is very likely that the customer would say: 'That is it; that is what I want.' "

The chances of deception are in the instant case as strong in my opinion, and perhaps stronger in view of the evidence of the retailers of their preference to sell "Capsopa".

For the reasons I have given, I think, with respect to the learned Chief Justice, that he has grounded his decision on faulty considerations or at least on considerations which should carry but little weight, and has attached insufficient importance to the essential element, whether the names, as such, are likely to confuse, especially bearing in mind that the first two syllables are identical. There is no need to prove intent to deceive, for the injury is the same whatever the intent may be; intent was not pleaded although it was made a submission on behalf of the appellant company here and in the court below. The learned Chief Justice did not come to a clear finding on this, but from his reference to the submission I understand him to mean that he was not satisfied that there had been intent. The component parts of the name "Capsopa" have been explained and are not illogical, and I do not think that intent has been proved. At the same time, the respondent company was unwise to use the prefix "Capso", a distinctive part of the appellant company's trade name, in the manner it did. It was not descriptive and therefore it was not, in honesty, expressly advantageous to use it, and if used at all it should have been incorporated in a way which would have avoided the risk of confusion.

In coming to my conclusion I have not overlooked the evidence of the respondent company's witnesses that, so far as they are aware, there have been no instances of confusion, and also the length of time which the appellant company allowed to elapse between the marketing of the respondent company's ointment and the appellant company taking action. These are certainly material matters for consideration, as are also the length of time the appellant company had enjoyed a reputation for its ointment, but the ultimate issue is whether or not confusion is likely to result; in all the circumstances I feel there is a real probability thereof, and that the name used by the respondent company is calculated to pass off its ointment for that of the appellant company. I would therefore reverse the judgment of the learned Chief Justice and grant an injunction as prayed. The wording of the injunction has not been a subject of complaint by the respondent company, and it complies with the form of order approved by the House of Lords in *Marengo v. Daily Sketch and Sunday Graphic Ltd.* (4) (1948), 65 R.P.C. 242.

As to damages, Kerly at p. 383 says:

"Proof of damage is not in every case essential to enable the plaintiff to maintain his action, for if he shows that the defendant is acting so as to pass off goods as those of the plaintiff which are not the plaintiff's it will generally be assumed that the plaintiff is thereby prevented from selling as many of the goods as he otherwise would."

I do not think the circumstances of the case negative this assumption, but rather that the actions of the respondent company are calculated to injure the appellant company.

The plaintiff asks for “Damages or account of profits”. Mr. Wilkinson has asked us to order an inquiry into damages. In Kerly at p. 315 it is said:

“the court may award nominal damages or fix a sum without ordering an account or an enquiry as to damages if the evidence of damage is not sufficient to justify the costs of an enquiry”.

The following is a further extract from Kerly at p. 315:

“The court has refused to order an account of profits where the plaintiff has neglected to take proceedings after becoming aware of the infringement. Damages have also been refused on the ground of delay.”

As to evidence of damage, it will not necessarily be presumed that the amount of goods sold by the defendant would, but for the defendant’s unlawful use of the plaintiff’s mark, have been sold by the plaintiff (Kerly, p. 313). In the instant case there is evidence which supports the view that a substantial part of the respondent company’s sales may have resulted from causes other than deception. The appellant company for a long time delayed taking action. In all the circumstances I think it is proper to award only nominal damages which I would fix at £50. I would order that the respondent company pay the costs of this appeal and the costs in the court below.

Sir Alastair Forbes V-P: I agree. The appeal is allowed with costs and there will be an order in the terms proposed by the learned Justice of Appeal.

Sir Trevor Gould JA: I also agree.

Appeal allowed. Injunction granted and £50 damages.

For the appellant company:

RJ Wilkinson QC and BE De Silva

For the respondent company:

AI James

For the appellant:

Advocates: Wilkinson & Hunt, Kampala

For the respondent:

Hunter & Greig, Kampala

A Rajabali Alidina v Remtulla Alidina and another
[1961] 1 EA 565 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	19 October 1961
Case Number:	22/1961
Before:	Law J

[1] *Practice – Money decree – Order for payment by instalments – Principles upon which court may grant indulgence to debtor – Order constituting virtual denial of decree-holder’s right – Indian Code of Civil Procedure, 1908, O. 20, r. 11 (1).*

Editor’s Summary

Five days before the rest of his goods were attached by creditors, the respondent purchased goods from the appellant which he sold at a profit the same day on ninety days credit. Subsequently the respondent was duly paid but he failed to pass on any portion of the money to the appellant and when the appellant applied for payment the respondent offered him twenty per cent. of the price in settlement. The appellant rejected this offer and sued for the price. He obtained judgment for Shs. 6,669/- including costs whereupon the respondent sought and obtained from the magistrate an order for payment by instalments of Shs. 75/- per month. The appellant brought this appeal against the order for payment by instalments complaining, *inter alia*, that the magistrate had given no reasons for making the order.

Held –

- (i) a debtor must show sufficient reason for indulgence and the matters to be taken into consideration by the court are the circumstances in which the debt was incurred and the financial position, conduct and bona fides of the debtor.
- (ii) the High Court has jurisdiction to interfere, in its appellate capacity, where the exercise by a magistrate in his discretion to grant instalments constitutes a virtual denial of the decree-holder’s right.
- (iii) in the circumstances of this case there was a virtual denial of the appellant’s right and accordingly the instalments would be increased to Shs. 200/- per month.

Appeal allowed. Order for payment by instalments of Shs. 200/- per month.

Case referred to:

(1) *Reoti Prasad v. Kunji Lal* (1932), 54 All. 539.

Judgment

Law J: This is an appeal by the plaintiff in Dar-es-Salaam District Court Civil Case No. 1132 of 1961, against an order by the learned resident magistrate that payment of the decretal amount by the defendant be made by instalments of Shs. 75/- a month. The exact form of the order, as endorsed on the decree, is as follows–

“It is hereby further ordered that the decretal amount be paid by monthly instalments of Shs. 75/-, the first payment to be paid on July 1, 1961, and subsequent instalments on the first day of each subsequent month with usual default clause. Plaintiff be and is hereby given liberty to apply to this court on or after December 31, 1961, for the amount of the monthly instalments to be revised.”

This order was made under the authority of O. 20, r. 11 (1), which reads:

“Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.”

All commentators on the Civil Procedure Code agree that the court’s discretion to order payment of the decretal amount in instalments is one which must be exercised in a judicial and not an arbitrary manner. The onus is on the defendant to show that he is entitled to indulgence under this rule.

It is for the defendant to show “sufficient reason” for indulgence being shown to him, and this court is immediately faced with a difficulty in this respect, as the learned resident magistrate has not stated what reasons put forward by the defendant he considered sufficient to justify the exercise of the court’s discretion in the defendant’s favour.

The decretal amount in this case is Shs. 5,884/-, to which must be added the appellant’s costs which have been taxed at Shs. 785/-. At Shs. 75/- a month, this debt will take more than seven years to pay off, excluding from consideration the interest on the decretal amount, which under the decree is accumulating at the rate of six per centum per annum. The appellant complains that the learned resident magistrate’s order is unreasonable on this ground alone. As is stated in Woodroffe and Amir Ali’s Civil Procedure in British India (2nd Edn. at p. 869) the powers given to the court should be exercised with a due consideration for the interests of the creditor as well as those of the debtor, and a case is quoted in which an order allowing nine years to pay a debt of 440 Rs. was reversed, and the period reduced by half.

Mr. N. P. Patel for the appellant has also referred me to the passage headed “sufficient reason” on the same page of Woodroffe and Amir Ali’s work, which sets out the matters which should be considered by a court in deciding whether or not “sufficient reason” exists.

These are:

- (a) the circumstances under which the debt was contracted,
- (b) the conduct of the debtor,
- (c) his financial position, and
- (d) his bona-fides in offering to pay a fair proportion of the debt at once.

If these tests are applied to the respondent, it will be seen that he does not make a good impression. As appears from the record of his evidence, when examined as to his means, he must have been on the verge of bankruptcy when he ordered the goods from the appellant, the price whereof formed the subject of the suit in which the order now appealed from was made. The respondent had incurred debts of Shs. 1,400,000/- mostly in 1960. In August, 1960, he made over stock to the value of Shs. 117,576/- to satisfy a creditor in whose favour he had made promissory notes which he could not meet when due. On October 15, 1960, he bought the appellant’s goods, the subject of the suit. He sold them at a profit on the same day, on ninety days credit. Five days later his remaining stock was attached by creditors. Although he has been paid for the goods which he bought from the appellant and re-sold, he did not pass on a single cent of this money to the appellant.

When the appellant asked for his money, in February, 1961, the respondent offered him twenty per cent. in full settlement. This casts some light on the respondent’s bona-fides. He had, apparently, enough money to be able to offer to pay twenty per cent. of his debt in full settlement, but he did not make any

payment on account when his offer was refused. Another indication of the respondent's lack of bona-fides can be found in the fact that when the respondent consented to judgment, on June 1, 1961, his advocate offered to pay the debt by instalments of Shs. 100/- a month, but when the matter came before another magistrate on June 8, 1961, this offer was reduced to Shs. 50/- a month, no explanation being given for the reduction.

It is difficult in these circumstances to understand why the learned resident magistrate decided to grant the respondent the very substantial indulgence of allowing him to pay off the decretal amount by instalments as low as Shs. 75/- a month.

Mr. Kesaria for the respondent submits that the discretion vested in the learned resident magistrate should not be interfered with, unless shown to have been exercised in an arbitrary and perverse manner. Mr. Kesaria points out that an important consideration in applications to pay by instalments is whether a refusal of such an application will deprive the debtor of his livelihood, and he submits that this consideration may well have influenced the learned resident magistrate in making the order which he did make.

As I have already pointed out, this court has no knowledge of the reasons which prompted the learned resident magistrate to extend indulgence in this case. He must have had some reason, and I do not believe that he acted arbitrarily or perversely. In these circumstances, I do not propose to set his order aside. But on the authorities, I am satisfied that this court can interfere, in its appellate capacity, where the magistrate's discretion was exercised so as to constitute a virtual denial of the plaintiff's right, as has happened in this case. In *Reoti Prasad v. Kunji Lal* (1) (1932), 54 All. 539, Boys, J. said:

"The result of this decree is that it would take the plaintiff more than seven years to recover the amount now due to him . . . It is manifest that the amount of the instalments and the period for their payment is a matter for the discretion of the court; but it is a discretion which is to be exercised within bounds. The exercise of it in the manner of the present suit constitutes a virtual denial of the plaintiff's rights."

I associate myself with those remarks, which I consider to apply exactly to the facts of the present appeal.

This appeal succeeds. With effect from November 1, 1961, inclusive, the learned resident magistrate's order dated June 15, 1961, will take effect as if for the figure "75", the figure "200" were substituted. In other words, I order that as from and including November 1, 1961, the decretal amount will be paid by instalments of Shs. 200/- and not Shs. 75/- as heretofore. The rest of the order remains unchanged; there will be the usual default clause, and the appellant retains the right to apply for the instalments to be revised. The appellant has substantially succeeded, and will have the costs of this appeal, which will be added to the decretal amount.

Appeal allowed. Order for payment by instalments of Shs. 200/- per month.

For the appellant:

NP Patel

For the respondent:

RC Kesaria

For the appellant:

Advocates: *NP Patel*, Dar-es-Salaam

For the respondent:
RC Kesaria, Dar-es-Salaam

R v A Mitha
[1961] 1 EA 568 (HCU)

Division: HM High Court of Uganda at Kampala
Date of judgment: 13 November 1961
Case Number: 62/1961
Before: Bennett J

[1] *Statute – Rules made under statutory powers – Specified Minister authorised to make rules – Rules made by Chief Secretary – Whether rules ultra vires – Urban Authorities Ordinance, 1958, s. 2 and s. 67 (1) (U.) – Urban Authorities Rules, 1959, r. 18 (U.).*

[2] *Evidence – Presumption of existence of facts – Minister empowered to make rules – Rules made by Chief Secretary – Governor empowered to direct a public officer to exercise powers of another public officer – No evidence of direction – Whether court must presume that rules duly made – Urban Authorities Ordinance, 1958, s. 2 and s. 67 (U.) – Interpretation and General Clauses Ordinance (Cap. 1), s. 16 (U.) – Interpretation and General Clauses (Amendment) Ordinance, 1959, s. 3 (U.) – Evidence Ordinance (Cap. 9), s. 4 and s. 112 (U.) – Indian Evidence Act, 1872, s. 4 and s. 114.*

Editor's Summary

The respondent was charged with causing refuse to be deposited on Crown land contrary to r. 18 of the Urban Authorities Rules, 1959, made under s. 67 (1) of the Urban Authorities Ordinance, 1958. By r. 67 (1) the person empowered to make rules is “the Minister for the time being responsible for urban local government”. The rules were in fact made by the Chief Secretary. At the trial it was submitted for the respondent that the rules were ultra vires as they had not been made by the Minister for Local Government. The magistrate accepted this submission and discharged the respondent. On an application for revision it was argued that the magistrate ought to have presumed that the Chief Secretary was the Minister for the time being responsible for urban local government at the time the rules were made, on the ground that s. 16 of the Interpretation and General Clauses Ordinance (as amended by s. 3 of the Interpretation and General Clauses Ordinance, 1959) authorises the Governor in certain events to direct a public officer to exercise and perform the powers and duties of another public officer. There was, however, no evidence that the Governor had given such a direction.

Held –

- (i) had there been evidence of a direction by the Governor under s. 16 of the Interpretation and General Clauses Ordinance, the court would have been entitled to presume that the direction had been properly given, but the court was not entitled to presume that such a direction had been given without evidence.

- (ii) the magistrate had exercised his discretion judicially in declining to presume that the Chief Secretary was authorised to exercise the powers of the Minister of Local Government to make the rules.

Application in revision dismissed.

Cases referred to:

- (1) *Narendra Lal Khan v. Jogi Hari* (1905), 32 Cal. 1107.
- (2) *Walvekar v. R.* (1926), 53 Cal. 718.

Judgement

Bennett J: This is an application by the Director of Public Prosecutions for revision of an order of the district court of Mbale discharging the respondent in respect of the charge under inquiry. In the district court the respondent was charged with causing refuse to be deposited on Crown land contrary to r. 18 of the Urban Authorities Rules, 1959, Legal Notice No. 306 of 1959. These rules purport to have been made under s. 67 (1) of the Urban Authorities Ordinance, 1958, Ordinance No. 16 of 1958. The person empowered to make rules by s. 67 (1) is “the Minister”. “Minister” is defined in s. 2 of the Ordinance as “the Minister for the time being responsible for urban local government”.

The rules in question were in fact made by the Chief Secretary on November 27, 1959, and came into force on January 1, 1960. At the time when the rules were made, the Minister of Local Government was Mr. L. M. Boyd and it was not disputed in the court below that his portfolio included urban local government.

At the outset of the proceedings in the court below it was submitted by the respondent’s advocate that the rules in question not having been made by the Minister of Local Government, Mr. L. M. Boyd, were ultra vires. This submission succeeded and the learned magistrate, in a considered judgment, declared the rules to be ultra vires and discharged the accused, no evidence having been called by the prosecution or by the defence. In this court the magistrate’s ruling has been attacked on the ground that he ought to have presumed that the Chief Secretary was the Minister for the time being responsible for urban local government at the time when the rules were made. It is said that the magistrate erred in taking into consideration a supplement to the *Gazette* dated September 17, 1959, headed “Central Government Organisation” from which it appeared that urban local government was one of the subjects for which the Minister of Local Government, Mr. L. M. Boyd, was responsible. It is said that the supplement was published for general information only. As to the question whether the magistrate could take into consideration a supplement to the *Gazette*, s. 55 of the Evidence Ordinance, Cap. 9, provides that the court shall take judicial notice of the

“functions and signatures of the persons filling for the time being any public office”

if their appointments have been notified in the *Gazette*. Mr. Boyd’s appointment was notified by General Notice 826 of 1955. The court was therefore bound to take judicial notice of his functions. Furthermore, in order to inform itself as to the extent of those functions, the court was entitled by s. 55 to “resort for its aid to appropriate books or documents of reference”. In my judgment a supplement to the *Gazette* was an appropriate document of reference than which no better could have been obtained.

On the face of it, therefore, the Chief Secretary was not “the Minister for the time being responsible for urban local government” or the proper authority to make the rules.

In the court below it was contended that it ought to be presumed that the Chief Secretary had been authorised by the Governor under s. 16 of the Interpretation and General Clauses Ordinance, Cap. 1, to exercise the powers of the Minister of Local Government. It was stated from the Bar that Mr. Boyd had been indisposed at the time when the rules were made, but no evidence was called to prove this: Nor was any evidence called to prove that the Governor had in fact given a direction under s. 16 of the Ordinance. If any such direction was given it was not published in the *Gazette* although, I do not consider the failure to publish it would necessarily be fatal to its validity.

Section 16 of the Interpretation and General Clauses Ordinance, (Cap. 1) as amended by s. 3 of the Interpretation and General Clauses (Amendment) Ordinance, 1959, Ordinance No. 2 of 1959, is as follows:

- “16. (1) Where by or under any Ordinance, any powers are conferred or any duties are imposed upon a public officer, the Governor may direct that if during any period owing to absence or inability to act from illness or any other cause such public officer shall be unable to exercise the powers or perform the duties of his office in any place under his jurisdiction or control, such powers shall be and may be exercised and such duties shall be performed in such place by the person named or by the public officer holding the office designated by the Governor, and thereupon such person or public officer, during any period as aforesaid, shall have and may exercise the powers and shall perform the duties aforesaid, subject to such conditions, exceptions and qualifications as the Governor may direct.
- “(2) When reference is made in any law to any public officer by the term designating his office, such term shall include the officer for the time being executing the duties of such office or any portion of such duties.
- “(3) In this section the expression ‘public officer’ includes a Minister.”

It is plain from the terms of the section that had the Minister of Local Government been unable, for any cause, to exercise the powers or perform the duties of his office, the Governor could, by virtue of sub-s. (1), have empowered the Chief Secretary to exercise the Minister’s powers and perform his duties. Moreover, had the Governor made such a direction, then by virtue of sub-s. (2), the reference to “the Minister” in s. 67 (1) of the Urban Authorities Ordinance would include the Chief Secretary, so that the Chief Secretary could have made the rules. The substantial question raised by this appeal is whether the learned magistrate ought to have presumed that the Chief Secretary was acting under an authority conferred by the Governor under s. 16 of the Interpretation and General Clauses Ordinance when he made the rules.

The Director of Public Prosecutions relied upon s. 112 of the Evidence Ordinance, (Cap. 9) illustration (e). This section reads:

- “112. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

Illustration (e) reads:

- “(e) that judicial and official acts have been regularly performed;”

Section 112 of the Uganda Ordinance reproduces s. 114 of the Indian Evidence Act and s. 4 of the Uganda Ordinance reproduces s. 4 of the Indian Act. The material part of s. 4 of the Uganda Ordinance reads:

- “4. Whenever it is provided by this Ordinance that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.”

It will be noted that the operative words of s. 112 of the Ordinance are “may presume” so that the section, when read with s. 4, confers upon the court a discretion as to whether it will presume a fact or call for proof of it. To quote from Woodroffe on the Law of Evidence (9th Edn.) p. 126:

- “This section (s. 4) renders it a judicial discretion to decide in each case whether the fact which under s. 114 may be presumed has been proved by virtue of that presumption. Circumstances may, however, induce the court to call for confirmatory evidence.”

The real question is, therefore, whether the learned magistrate exercised his discretion judicially in refusing to make the presumption for which the Crown asked.

The Director of Public Prosecutions cited certain English authorities in which it was held that evidence that a person had acted in a public office was sufficient proof of due appointment to that office. These decisions, however authoritative as expositions of the common law of England, cannot be regarded as necessarily applicable in Uganda where the law of evidence is codified. Moreover, they are not on all fours with the instant case since the question for decision here is not whether a particular Minister had been duly appointed to his office but whether the Governor had authorised one Minister to exercise the powers of another.

The learned Director also cited the following passage from Woodroffe, (9th Edn.) p. 808 in support of his argument:

“This section (s. 114) authorises the presumption that a particular judicial or official act, which has been performed, has been performed regularly; and the presumption can only be overturned by strong evidence.”

The learned Director did not cite the sentence immediately following the passage, which reads:

“But it does not authorise the presumption without any evidence that the act has been performed.”

Reading the two sentences together and attempting to apply the principles therein set out to the facts of the instant case, it would appear that had there been evidence of a direction by the Government under s. 16 of the Interpretation Ordinance, the court would have been entitled to presume that the direction had been properly given, but that it would not be entitled to presume that a direction by the Governor had been given in the absence of evidence of that fact. I am fortified in this view by the construction which the courts in India have placed upon s. 114 of the Evidence Act.

Thus in *Narendra Lal Khan v. Jogi Hari* (1) (1905), 32 Cal. 1107 (Indian High Court Reports 3 Cal. 682), the plaintiff sued for possession of certain lands on the grounds that they had been transferred to him by the Collector under s. 48 and s. 50 of the Chaukidary Act. There was nothing to show that any Commission had been appointed under s. 58 or that any report had been submitted under s. 61 of the Act. It was held that the defendant was entitled to question the Collector's right to make the transfer there being no presumption that the conditions precedent to the making of the transfer had been fulfilled. To quote from the judgment of Woodroffe, J., at p. 1121:

“We have been asked to infer that because the Collector transferred the land there must have been prior valid proceedings entitling him to do so, and s. 114, clause (e) of the Evidence Act is relied on. The meaning, however, of that provision is that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential for a plaintiff's case. None of the facts to which I have referred were admitted before us, though the learned pleader for the appellant endeavoured to supplement his client's case by statements of his own of which I can take no notice as the case must be determined as it appears on the record before us.”

Again, in *Walvekar v. R.* (2) (1926), 53 Cal. 718, it was held that s. 114 of the Evidence Act did not justify the court in dispensing with the necessity of proof that the preliminary conditions justifying the issue of a warrant to enter a

common gaming house issued under s. 46 of the Calcutta Police Act had been performed. To quote from the judgment of Ghose, J., at 728:

“The learned magistrate seems to think that s. 114, illustration (e) of the Evidence Act covers this case and that he may presume that judicial and official acts have been regularly performed, i.e. that the acts necessary before an issue of a warrant of this description were properly performed. This argument, as I understand it, has been employed for the purpose of doing away with the necessity of proof of compliance of the preliminaries referred to above, namely, information on oath and of due ‘inquiry’ before issue of the warrant. Having regard, however, to what I have already held about the validity of the warrant s. 114, illustration (e) of the Indian Evidence Act cannot in my opinion be relied upon in this case. The meaning of that provision is that if an official act is proved to have been done it will be presumed to have been regularly done.”

In all the circumstances, I am of opinion that the learned magistrate exercised his discretion judicially in declining to presume that the Governor had authorised the Chief Secretary to exercise the powers of the Minister of Local Government prior to the making of the rules. The application for revision is accordingly dismissed.

Application in revision dismissed.

For the applicant:

JJ Dickie (Director of Public Prosecutions, Uganda)

For the respondent:

JM Shah

For the Crown:

Advocates: *The Director of Public Prosecutions*, Uganda

For the respondent:

Patel & Shah, Mbale

R v Athmani s/o Abdullah
[1961] 1 EA 572 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	11 October 1961
Case Number:	174/1961
Before:	Mosdell J

[1] Criminal law – Trial – Irregularity – Two cases tried together – Separate charges – Same accused concerned in both cases – Charges concerned with series of housebreakings and thefts – Whether prejudice occasioned to accused – Whether trial a nullity or irregularity remediable – Penal Code, s. 265 and s. 294 (1) (T.) – Criminal Procedure Code (Cap. 20), s. 346 (T.).

Editor's Summary

In a district court there were two distinct cases against an accused. In the first case he was charged on two counts and in the second case he was separately charged on six counts, all of which concerned a series of alleged housebreakings and thefts over a short period. The charges in both cases were tried together and the accused was convicted on all counts and sentenced to imprisonment. When the records were sent to the High Court for confirmation of sentence, the procedure of trying both cases together was considered in revision.

Held –

- (i) whether the simultaneous trial of two separate charges against an accused in a subordinate court renders a trial a nullity depends upon whether prejudice was thereby occasioned to the accused.
- (ii) in the present case since the charges were of the same character and concerned a series of alleged housebreakings and thefts all within a short time the accused had not been prejudiced at all and accordingly the irregularity was remediable under s. 346 of the Criminal Procedure Code.

- (iii) if prejudice is occasioned to an accused by such simultaneous trial, then the irregularity is not remediable under s. 346 *ibid*.

Sentence confirmed.

Cases referred to:

- (1) *Jeremiah s/o Mwangi v. R.* (1951), 18 E.A.C.A. 218.
- (2) *Mohanlal Karamshi Shah v. R.* (1955), 28 K.L.R. 248.
- (3) *R. v. McDonnell*, 20 Cr. App. R. 163.

Judgment

Mosdell J: The accused was on August 17, 1961, convicted in the district court of Newala at Newala of three counts of housebreaking contrary s. 294 (1) of the Penal Code and three counts of stealing contrary to s. 265 *ibid*, in Newala Criminal Case No. 200 of 1961, and of one count of housebreaking contrary to s. 294 (1) of the Penal Code and one count of stealing contrary to s. 265 *ibid* in Newala Criminal Case No. 199 of 1961.

The records were sent to the High Court for the purpose of confirmation of sentences, the accused having been sentenced to three year's imprisonment on each of the six counts in Criminal Case No. 200 of 1961, to run concurrently, and to three years' imprisonment on each of the two counts in Criminal Case No. 199 of 1961, to run concurrently, making a total effective sentence of six years' imprisonment. It is clear from the records that although separately charged with the six counts in Newala Criminal Case No. 200 of 1961 and with the two counts in Newala Criminal Case No. 199 of 1961, all eight counts were tried together. This gave me reason to believe that the trial might be a nullity and, the Attorney-General having been given and accepting an opportunity to argue the matter for the Crown, the matter was duly dealt with on revision.

Mr. Taylor for the Crown submitted that in accordance with the decision of the learned Chief Justice in Criminal Appeals Nos. 92–94 of 1960, the trial of the two charges together was an irregularity which was remediable under the provisions of s. 346 of the Criminal Procedure Code. Mr. Taylor, although his attention had been drawn to the case of *Jeremiah s/o Mwangi v. R.* (1) (1951), 18 E.A.C.A. 218, where it was held that a simultaneous trial of two informations for murder was not permissible, distinguished it because that case related to the one trial in the High Court of two informations for murder. Mr. Taylor, however, did refer to the case of *Mohanlal Karamshi Shah v. R.* (2) (1955), 28 K.L.R. 248. In the latter case six tenants each made two complaints against their landlord, the accused. The magistrate framed two identical counts in respect of each of the complainants, and these were embodied in different case files consecutively but separately numbered. The magistrate tried all six cases simultaneously and found the accused guilty on all twelve counts, in respect of which fines were imposed. The accused appealed to the Kenya Supreme Court, where Sir Kenneth O'Connor, C.J., and Rudd, J., held that it being elementary in English criminal law that a man cannot be tried at the same time on two indictments charging different offences, the same rule having been applied to Kenya in the case of an accused person tried simultaneously on two informations and any such trial being a nullity, the same rule must apply to an accused person tried simultaneously in different criminal cases by a magistrate. There is a provision in the Kenya Criminal Procedure Code in similar terms to s. 346 of the Tanganyika Criminal Procedure

Code.

Mr. Taylor submitted that in the judgment of the appellate court in the latter case the statement:

“We take it that the same rule must apply to an accused person tried by a magistrate simultaneously in different cases”

was to be construed as being a ruling peculiar to the facts in that case. I did not follow Mr. Taylor's argument as no such qualification appears in the judgment. The decision in that case appears to me to be authority for the proposition that as two informations cannot be tried simultaneously in the High Court of Kenya so two separate charges of whatever nature cannot be tried simultaneously by the court of a magistrate in Kenya. That case, of course, is not binding on me, but is of great persuasive authority.

It is clear in England that a trial of a person indicted on two separate indictments is a nullity if he is tried on both together: *R. v. McDonnell* (3), 20 Cr. App. R. 163. Mr. Taylor did not enlighten me as to the reason for the distinction between an indictment or information and a charge, which enables two separate charges to be tried simultaneously, whilst a simultaneous trial on two indictments or informations is not permissible.

It would seem that in a court of summary jurisdiction in England two separate informations even against different defendants can be tried together provided the defendants agree to their being heard together. It is stated in Stone's Justices' Manual, 1961, Vol. 1, p. 259:

"But where cases against more than one defendant are heard separately and some of the prosecution's evidence is common to all the cases, the court is not entitled to rely upon evidence given in an earlier case, not being the case then before them, to which the later defendant has had no opportunity of directing cross-examination. The proper course is to ask the respective parties if they agree to the two informations being heard together, and if they so agree to give each of them an opportunity of cross-examining witnesses for the prosecution. *Taylor Central Garages (Exeter) Ltd. v. Roper*, 1951, 115 J.P. 445."

The reason why in English law it is not permissible to try two separate indictments simultaneously appears to me to be based on the ground that such a proceeding would be prejudicial to an accused. In the instant cases there was not the slightest prejudice occasioned to the accused by the simultaneous trial of the two charges. The charges were of a similar character and concerned a series of alleged housebreakings and thefts all committed within a very short period of time. In my view, therefore, in the instant cases the irregularity is remediable under s. 346 of the Criminal Procedure Code. Whether the simultaneous trial of two separate charges against the same accused in a subordinate court renders the trial a nullity in Tanganyika depends, in my view, upon whether thereby prejudice was occasioned to the accused. If it was not, then the irregularity is remediable under the provisions of s. 346 of the Criminal Procedure Code. If prejudice was occasioned to an accused by such simultaneous trial, then the irregularity is not remediable under s. 346 *ibid* and the trial is a nullity.

I confirm the sentences in Newala Criminal Cases Nos. 199 and 200 of 1961.

Sentences confirmed.

For the Crown:

AE Taylor (Crown Counsel, Tanganyika)

For the Crown:

The Attorney-General, Tanganyika

John Nzoli and another v R
[1961] 1 EA 575 (SCK)

Division: HM Supreme Court of Kenya at Nairobi
Date of judgment: 4 December 1961
Case Number: 857 & 858/1961
Before: Sir Ronald Sinclair CJ and Rudd J

[1] *Street traffic – Public service vehicle – Joint owners – Evidence of ownership – Traffic Ordinance, 1953, s. 106 (K.).*

[2] *Street traffic – Public service vehicle – Order of prohibition issued by inspector of vehicles – Condition of vehicle dangerous – Vehicle used on road – Owner charged with permitting use and using – Scianter – When offence absolute – Traffic Ordinance, 1953, s. 2, s. 52 (1), s. 55 (1), s. 92, s. 103, s. 106 (K.) – Transport Licensing Ordinance (Cap. 237), s. 21 (K.) – Indian Evidence Act, 1872, s. 105.*

Editor's Summary

The appellants were charged as joint owners along with the driver of a public service vehicle with offences concerned with the use of the vehicle on the road. The first count alleged the use of the vehicle while an order of prohibition was in force in respect thereof, the second count alleged the use of the vehicle whilst in a condition likely to be dangerous, the third count alleged the ownership of the vehicle on a road without a p.s.v. licence, and the fourth count alleged use of the vehicle in contravention of the conditions of a private carrier's licence. The appellants and the driver were all convicted but the driver did not appeal. The evidence showed that the police stopped the vehicle on the road and found therein at least one fare-paying passenger and other passengers who were not employees of the owners. At a subsequent interview the first appellant produced to the police an order of prohibition which was still in force when the vehicle was stopped as the defects specified in the order had not been remedied. The first appellant also produced a private carrier's licence issued under the Transport Licensing Ordinance a condition of which restricted the carriage of persons to employees of the owner in the course of his business. At the trial neither the driver nor the first appellant gave evidence but the second appellant gave sworn evidence that he had ceased to be an owner in 1958 when he sold his share to the first appellant. He admitted never having given notice of the change of ownership. The prosecution put in a certificate under s. 106 of the Traffic Ordinance which *prima facie* was evidence that the appellants were registered as owners and the magistrate taking into consideration a statement made by the driver to a constable not in the presence of the appellants rejected the second appellant's evidence and found the appellants to be the owners. He also rejected a submission by the defence that on two counts knowledge of the use of the vehicle must be proved by the prosecution against the appellants.

Held –

- (i) the statement by the driver was inadmissible against the appellants and, since he might not have disbelieved the second appellant but for the effect upon him of the inadmissible statement, the magistrate's finding that the second appellant was a joint owner could not stand.
- (ii) the second appellant could only be convicted if he were proved to be a joint owner at the time of the offences and his appeal must, therefore, be allowed.
- (iii) where there is a prohibition against user, the offence is absolute in the sense that no mens rea need

be proved but when the offence is permitting user, it must be proved that the person charged permitted, as opposed to committed the unlawful user, and the onus of proof rests upon the prosecution.

- (iv) the only reasonable inference from the evidence was that the first appellant permitted the user of the vehicle.
- (v) as the vehicle carried a passenger or passengers for hire or reward, it was a public service vehicle as defined in s. 2 of the Traffic Ordinance and under s. 105 of the Indian Evidence Act the onus was upon the first appellant to show that there was a public service vehicle licence in force; that onus had not been discharged.

Appeal of the second appellant allowed. Appeal of the first appellant dismissed. Sentence on the fourth count varied.

Cases referred to:

- (1) *James & Son Ltd. v. Smee*, [1954] 3 All E.R. 273.
- (2) *Mohamed Hassan Ismail v. R.* (1955), 22 E.A.C.A. 461.
- (3) *John v. Humphreys*, [1955] 1 All E.R. 793.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court:

The two appellants in these consolidated appeals against their convictions and sentences on the following charges:

“First Count

“Using a vehicle in respect of which an order of prohibition is in force, contrary to s. 103 (5) of the Traffic Ordinance, 1953.

“John Nzoli and James Muthama, on the 2nd day of April, 1961, on the Tala-Kangundo road in the Machakos District of the Southern Province, being the joint owners of motor vehicle Ford van Reg. No. A 6863, did permit the use of the said vehicle, there still being in force in respect thereof an order of prohibition in writing issued by an inspector of vehicles, a condition of the said order of prohibition being that the vehicle may not be used after March 25, 1961, until a certificate of roadworthiness in respect thereof has been issued.

“Second Count

“Using a motor vehicle on a road, the parts and equipment thereof being maintained in such a condition that the driving of the vehicle is likely to be a danger to other users of the road, contrary to s. 52 (1) and punishable under s. 55 (1) of the Traffic Ordinance, 1953.

“John Nzoli and James Muthama, on the 2nd day of April, 1961, on the Tala-Kangundo road in the Machakos District of the Southern Province, being the joint owners of motor vehicle Ford van Reg. No. A 6863, used the said vehicle, the steering mechanism of which was maintained in such a condition that the driving of the vehicle would be likely to be a danger to other users of the road, in that twelve inches of free play was found in the said steering mechanism.

“Third Count

“Owing a public service vehicle on a road, there not being in force in relation to such vehicle a public service vehicle licence, contrary to s. 92 (1) and punishable under s. 92 (2) of the Traffic Ordinance, 1953.

“John Nzoli and James Muthama, on the 2nd day of April, 1961, on the Tala-Kangundo road in the Machakos District of the Southern Province, being the joint owners of motor vehicle Ford van Reg. No. A6863, a public

service vehicle carrying passengers for hire or reward, used the said vehicle whilst there was not in force in relation thereto a public service vehicle licence issued under Part XI of the Traffic Ordinance.

“Fourth Count

“Using a motor vehicle on a road in contravention of the conditions of a private carrier’s licence, contrary to s. 21 of the Transport Licensing Ordinance, as amended by Ordinance No. 23 of 1955.

“John Nzoli and James Muthama, on the 2nd day of April, 1961, on the Kangundo-Tala road in the Machakos District of the Southern Province, being the joint owners of motor vehicle Ford van Reg. No. A 6863, permitted the use of the said vehicle in contravention of a condition of private carrier’s licence No. TLB. 4939, issued in respect of the said vehicle, in that nine persons, excluding the driver, were being carried, not all being employees of the licensees, a condition of the licence being that the carriage of any persons other than the employees of the licensee being carried in the course of their employment is not authorised.”

The two appellants, John Nzoli and James Muthama, were respectively the second and third accused at the trial. The first accused, who has not appealed, was convicted as the driver of the vehicle in question on separate charges of contravening the same provisions of the law.

It was established by the evidence that on April 2, 1961, a Ford pick-up registered number A 6863 which had come from Machakos was stopped by the police at Kangundo. The vehicle was carrying at least one fare-paying passenger and other passengers who were not employees of the owner or owners. The registered owners of the vehicle were the two appellants. Subsequently the police interviewed the first appellant who produced an order of prohibition dated March 23, 1961, and issued by an inspector of vehicles under the provision of s. 103 (4) of the Traffic Ordinance, 1953 prohibiting the use of vehicle No. A 6863 until certain specified defects had been remedied. On April 2, 1961, the defects had not been remedied and the order of prohibition was still in force. The first appellant also produced a C licence, that is a private carrier’s licence, issued under the provisions of the Transport Licensing Ordinance in respect of the same vehicle, a condition of which was that no persons were to be carried other than employees of the owner in the course of his business.

Neither the first accused nor the first appellant gave evidence or made any statement at the trial. The second appellant gave evidence on oath in which he alleged that although his name still appeared as one of the registered owners, he in fact ceased to be an owner of the vehicle in 1958 when he sold his share to the first appellant for Shs. 1,000/-. He agreed that he had never notified the authorities of the change of ownership.

The certificate (Exhibit 1) put in by the prosecution showing that on May 8, 1961, the registered owners of the vehicle were the two appellants was by virtue of the provisions of s. 106 of the Traffic Ordinance *prima facie* evidence that they were the owners on that date. The learned trial magistrate rejected the second appellant’s evidence and was satisfied that the two appellants were joint owners of the vehicle at the time when the offences were committed. In arriving at that conclusion the magistrate took into consideration a statement made by the first accused to Constable Samuel Makau (P.W. 1), not in the presence of either of the appellants, that the public service vehicle licence was held by one of the “owners” at Nairobi. That statement was clearly inadmissible as against the appellants. It is evident that the magistrate attached some weight to the statement and we are unable to say that had he not wrongly taken it into consideration he would necessarily have disbelieved the second appellant’s explanation. For that reason we are of opinion that the magistrate’s finding that the second appellant was a joint owner of the vehicle with the first appellant at the material time cannot stand.

The second appellant could not be convicted on any of the counts unless it was proved that he was an owner of the vehicle in question at the time when the offences were committed. The appeal of the second appellant is accordingly allowed and his conviction and sentence on each of the four counts are quashed. The fines imposed on him, if paid, must be refunded to him.

We turn now to the appeal of the first appellant. In the first count he was charged with permitting the use of the vehicle in respect of which an order of prohibition was in force and in the fourth count with permitting the use of the vehicle on a road in contravention of the conditions of a private carrier's licence. There is no doubt that in each case there was a user of the vehicle in contravention of the sections under which this appellant was charged and the question for decision is whether the magistrate was right in finding that in each case the first appellant permitted the user in contravention of the sections. The magistrate dealt with this question in the following passage in his judgment:

"Counsel for the defence has raised the following points:

- (1) In relation to counts one and four the essence is one of the owners 'permitting' the use of the vehicle as alleged and that the onus lay on the prosecution to show that the second and third accused did knowingly so permit. With this proposition I am utterly unable to agree. I do not propose to go into this issue in great detail as in my view the matter has been dealt with in ample detail in the case of *Remat Nanji Ahmed v. R.*, [1959] E.A. 804 (T.) and the cases cited therein. It is clear therefore that the first accused was driving the said vehicle, owned by the second and third accused with at the very least an inferred permission by the second and third accused. Had it been alleged that first accused was driving on a frolic of his own the position might have been different, but this has not been suggested by either second or third accused and is in my view not a matter for the prosecution to rebut in advance, but for the defence to show as being facts specially within their knowledge under s. 105 of the Evidence Act. This has not been done. I am satisfied that the second and third accused did 'permit' the use of the vehicle by the first accused. I am further satisfied from the authorities that this is an absolute prohibition and no mens rea need be shown on the part of the second and third accused."

In *James & Son Ltd. v. Smee* (1), [1954] 3 All E.R. 273, Parker, J., as he then was, delivering the majority judgment of the divisional court, said at p. 277:

"It seems clear that while the driver of a vehicle on the road 'uses' that vehicle within the meaning of reg. 101, so also, if he be a servant, does his master whether that master be a private individual or a limited company provided always that the servant is driving on his master's business. It cannot be said that only the servant uses and that the master merely causes or permits such use. In common parlance a master is using his vehicle if it is being used by his servant on his business and there is still room for the application of the words 'causes or permits' since he may request or permit a friend to use the vehicle.

"Further, applying the well-known test laid down by Atkin, J. in *Mousell Bros. v. L. & N.W. Ry.* ([1917] 2 K.B. at p. 845), it seems clear that the prohibition against user in contravention of reg. 75 is absolute in the sense that no mens rea apart from user need be shown to constitute the offence.

"The appellants were, however, charged with permitting the use in contravention of reg. 75 which, in our opinion, at once imports a state of

mind. The difference in this respect was pointed out as long ago as 1894 by Collins, J., in *Somerset v. Wade*, [1894] 1 Q.B. 574, where he distinguished an absolute prohibition against a licensee selling to a drunken person and a prohibition against permitting drunkenness. In the latter case he must be shown to have known that the customer was drunk before he can be convicted: cf. also *Ferguson v. Weaving*, [1951] 1 All E.R. 412. Knowledge, moreover, in this connection includes the state of mind of a man who shuts his eyes to the obvious or allows his servant to do something in the circumstances where a contravention is likely not caring whether a contravention takes place or not: cf. *Goldsmith v. Deakin* (1933), 150 L.T. 157; *Prosser v. Richings*, [1936] 2 All E.R. 1627; and *Churchill v. Norris* (1938), 158 L.T. 255.”

It is clear, therefore, that where there is a prohibition on user, the offence is absolute in the sense that no mens rea need be proved in addition to the user by the person charged. On the other hand, when the offence is permitting a user it must be proved that the person charged “permitted”, as opposed to “committed”, the user in contravention of the provision of the law under which he is charged. The magistrate was therefore wrong in holding that in the offences charged in the first and fourth counts mens rea on the part of the first appellant need not be shown.

We think the onus was on the prosecution affirmatively to prove that the appellant permitted the user in contravention of the section in question. Of course, permission can be inferred from the circumstances and as Parker, J., observed in *James & Son Ltd. v. Smea* (1):

“Knowledge . . . includes the state of mind of a man who shuts his eyes to the obvious or allows his servant to do something in the circumstance where a contravention is likely not caring whether a contravention takes place or not.”

We are, however, of the opinion that the magistrate could not reasonably have come to any other conclusion on the evidence but that the first appellant permitted the user of the vehicle as alleged in the first and fourth counts. As to the first count, the only reasonable inference from the evidence is that the first accused was driving the vehicle with the first appellant’s permission and, as the first appellant had knowledge of the order of prohibition, it follows that he must have permitted the use of the vehicle while the order of prohibition was in force. As to the fourth count, the first accused was clearly acting on behalf of the owner when he accepted the payment voucher (Exhibit 6) from the fare-paying passenger and again we think the only reasonable inference from the evidence, in the absence of any explanation by the first appellant, is that the first appellant permitted the first accused to use the vehicle to carry fare-paying passengers who were not his employees.

It was also submitted with regard to the first count that the order of prohibition was not properly proved in evidence. We do not think there is any substance in that submission. It is true that at the commencement of the trial the order of prohibition was merely handed in by the prosecutor, but any irregularity there might have been was subsequently cured by the evidence of Inspector Rowcroft (P.W. 3) who said that the order was produced to him by the first appellant and identified it in court.

For those reasons we are of opinion that the appeal of the first appellant as far as it relates to the first and fourth counts must fail.

There is no substance in the appeal against conviction on the second count. It was not in dispute that the condition of the vehicle was as alleged in the charge, and, as we have said, it was established that the first appellant used the vehicle on a road in that condition.

With regard to the third count, as the vehicle carried a passenger or passengers for hire or reward, it was a public service vehicle within the meaning of the definition in s. 2 of the Traffic Ordinance and the first appellant as the owner was guilty of the offence charged unless there was a public service vehicle licence in force in relation to the vehicle. There was no evidence adduced by the prosecution that there was no public service vehicle licence in force in relation to the vehicle. Under s. 105 of the Indian Evidence Act, however, the onus was upon the appellant to show facts indicating that there was a public service vehicle licence in force in relation to the vehicle: see *Mohamed Hassan Ismail v. R.* (2) (1955), 22 E.A.C.A. 461, and *John v. Humphreys* (3), [1955] 1 All E.R. 793. That onus was not discharged.

We see no reason to interfere with the sentences on the first, second and third counts. As to the sentence on the fourth count, that count depended to a great extent upon almost the same facts as the third count. In the circumstances and especially in view of the sentence on the third count we think the sentence on the fourth count should be reduced to a fine of Shs. 50/- or two weeks' imprisonment in default of payment and we so order.

Appeal of the second appellant allowed. Appeal of the first appellant dismissed. Sentence on the fourth count varied

For the appellants:

RN Sampson

For the respondent:

KC Brookes (Acting Deputy Public Prosecutor, Kenya)

For the appellant:

Advocates: *Sampson & Ransley*, Nairobi

For the respondent:

The Attorney-General, Kenya

Tei s/o Kabaya v R
[1961] 1 EA 580 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	8 November 1961
Case Number:	109/1961
Before:	Sir Alastair Forbes V-P, Crawshaw and Newbold JJA
Appeal from:	H.M. Supreme Court of Kenya—Madan, J

[1] *Criminal law – Murder – Provocation – Misdirection – Failure to consider all evidence consistent with provocation – Whether retaliation excessive – Conviction reduced to manslaughter – Penal Code, s.*

Editor's Summary

The appellant was convicted of the murder of a police constable. The incident occurred when the deceased and another constable, both in plain clothes, who were enquiring into the illegal possession of native liquor, arrived at a village where the appellant and his father lived. The constables saw the appellant's father and another man both of whom had also been charged with and acquitted of the murder sitting outside the appellant's house drinking tembo. The appellant was sleeping in the house, and the deceased entered and brought the appellant out by force. The deceased hit the appellant who broke away and went for a panga from a nearby house. Meantime the appellant's father had also been hit, and the appellant returning with the panga saw that his father was bleeding from the face. On the appellant's approach the constables ran away but the appellant chased them and after running some distance caught up with the deceased and killed him with several panga blows. In his summing-up the trial judge referred to the question of provocation and to certain but not all the evidence relevant to that issue. On appeal the principal complaint was that the trial judge did not give proper consideration to the question of provocation.

Held –

- (i) the entry of the deceased into the appellant's house, the pulling of the appellant out and the hitting of the appellant and his father were unlawful acts and could have amounted to provocation under s. 209 of the Penal Code.
- (ii) the trial judge had not appreciated that there were matters disclosed by the evidence, besides those considered by him, which could amount to provocation; and since, had he considered such matters when coming to his finding, he might not necessarily have convicted of murder, the conviction must be altered to manslaughter.

Appeal allowed. Conviction of murder reduced to manslaughter.

Cases referred to:

- (1) *Obar s/o Nyarongo v. R.* (1955), 22 E.A.C.A. 422.
- (2) *Gaboye s/o Parmat v. R.* (1949), 16 E.A.C.A. 140.
- (3) *Okurutumu s/o Ongiro* (1938), 5 E.A.C.A. 111.
- (4) *R. v. Kirangi s/o Bugangari* (1940), 7 E.A.C.A. 69.
- (5) *R. v. Wanusu s/o Mwanjia* (1939), 6 E.A.C.A. 76.
- (6) *R. v. Balku* (1938), 30 All. 789.

Judgment

Crawshaw JA: read the following judgement of the court:

The appellant was charged jointly with his father, Kabaya s/o Tei (hereinafter referred to as “the second accused”), and one Mwakadamu s/o Kiwewe (hereinafter referred to as “the third accused”) with the murder of Kitole s/o Yeri. The appellant was convicted and sentenced to death, the second accused being acquitted at the same time; the third accused was not called upon to make his defence and was acquitted at the end of the prosecution case.

The appellant now appeals against conviction, the principal ground of complaint being that the trial judge did not give proper consideration to the question of provocation.

The incident arose when two police constables, Cheruyot arap Kipseren and the deceased, and a police informer, Katana Muru, arrived at Mwatundu village where the appellant and his father lived. The two police constables had been sent by Police Inspector Makarios to the area to enquire into illegal possession of native liquor and to arrest persons involved, and also to investigate a theft. The constables were in plain clothes and each carried a stick, and it was on the way that they met Katana who accompanied them. On arrival at Mwatundu they saw the second and third accused sitting outside, or not far from, the appellant's house drinking “tembo”. There is conflict of evidence whether the appellant was sitting with them at the time and went into his house on their approach, or whether he was inside his house at the time of their arrival. The appellant in evidence said he had already gone into his house to sleep, but admitted that he had earlier been drinking tembo with the other two accused. The question when he entered the house is not important, for if the constables suspected those sitting outside of being

in illegal possession of native liquor, they could be expected to take steps to ascertain whether other persons or more liquor were inside the house also. This is apparently what the deceased did for he entered the house and brought the appellant out by force. There is no evidence that the appellant knew or suspected that the deceased or Cheruyot was a police constable. There is some evidence that the deceased hit the appellant. The appellant, resenting the actions of the deceased, broke away from him and fetched a panga from a nearby house, by which time the second accused had also been hit. The appellant had not seen this blow but, returning with the panga, he saw blood on the second accused and this he says enraged him the

more. Seeing the appellant approaching with the panga, the constables and Katana ran away. After some 600 yards chase the appellant caught up with the deceased who was there and then killed by many blows with the panga; the doctor who carried out the post-mortem examination described 22 injuries and said that death was due to shock and haemorrhage from the multiple lacerations, no particular one being fatal in itself. The appellant and the second accused immediately went and reported to the police.

So much for the outline of the events which were not, we think, in dispute. There were discrepancies between the prosecution witnesses as to what exactly happened and between them and the defence witnesses. The appellant said the deceased slapped and kicked him in the house without explanation as to why he was there, and hit him with his stick after he had pulled him out of the house, and it was then that he, the appellant, broke away and ran for the panga. No one saw what occurred inside the house, unless the second accused did, and he largely corroborated the appellant's story, but Katana said the deceased hit the appellant with his stick outside on seeing the appellant about to catch him around the waist. Cheruyot said the deceased aimed a blow with his stick at the appellant but missed.

The second accused said that after the appellant had gone to fetch the panga "the constable who remained near him" (the second accused)—presumably Cheruyot—picked up a knife and stabbed him in the cheek. In cross-examination, however, he said it was the deceased who stabbed him. Cheruyot said the second accused threatened him with a knife and that he, Cheruyot, hit the knife from the second accused's hand and in so doing the blow caught the second accused on the cheek. The learned judge observed that the medical evidence did not confirm Cheruyot's account of the incident, and said,

"I am inclined to think that probably what happened was that either during the process of picking up the knife, or deliberately, Cheruyot wounded the second accused on his left cheek."

We do not think that for the purposes of this appeal it really matters which account is the true one, for the appellant did not see the blow but only the blood on his father which it caused. Both the appellant and the second accused say there was a considerable amount of blood and Katana said "It came down to the front of the body also". The learned judge came to no finding as to the extent of the blood.

The learned judge accepted Cheruyot's evidence that after the second accused had been struck the appellant aimed a blow at him, Cheruyot, with the panga, which Cheruyot warded off with his stick; that Cheruyot and the deceased then ran away in one direction, Katana having already run away in another direction; that the appellant chased Cheruyot and the deceased and threw his panga at Cheruyot, hitting him on the shoulder and fracturing the scapula; that Cheruyot then hid in the bush and the appellant continued to chase the deceased and that Cheruyot then heard people shouting and the deceased's voice saying "I am a police officer".

The appellant admits causing some of the injuries on the deceased but not all. There can be no doubt, however, that he at least participated in the killing of the deceased and that, apart from the question of provocation, he would be guilty of murder. He has not in his memorandum of appeal denied responsibility for the killing, and the question we have to decide is whether the learned judge was correct in his direction as to the facts to be considered in order to determine whether there might have been provocation and in finding that there was no legal provocation which would reduce the offence from murder to manslaughter. The relevant provisions of s. 209 of the Penal Code which define provocation are as follows:

- “209. (1) The term ‘provocation’ means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.
- “(2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
- “(3) A lawful act is not provocation to any person for an assault.”

In his summing-up to the assessors the learned judge explained to them the meaning of legal provocation. The first assessor (and the second and third assessors agreed with him) said, *inter alia*,

“The constables did not identify themselves when they reached the village. As strangers they began to attack the owners of the houses. They provoked the owners”;

their opinion was that the appellant was not guilty of murder. The learned judge found himself unable to agree with the assessors, saying,

“I find that when the first accused chased the deceased with a panga, he had not received provocation”.

The learned judge had previously posed the question

“whether what happened both inside and outside the hut constituted provocation in law”.

He accepted the medical evidence of Dr. Onyango, who had examined the appellant the same day as the incident and found no signs of injury, although the appellant complained to him of having been struck on several parts of his body. The doctor said, “If considerable force had been used for a blow with Exhibit B” (the stick) “I would have expected to find evidence on the parts complained of”. The learned judge after reviewing this evidence and finding the appellant to be an unreliable witness said,

“If I accept Dr. Onyango’s evidence, the first accused could not possibly have received the three blows outside the house. If I accept Dr. Onyango’s evidence, then the question of provocation would also disappear and it would not enure to the benefit of the first accused . . . I find it impossible to believe that the first accused was beaten. He was so obviously not telling the truth”.

Apart from the question whether the appellant had been hit or not, the only other form of possible provocation which the learned judge appears to have considered in his judgment was the unlawful entry (if such it was) of the deceased. The learned judge said

“According to the first accused’s own evidence, he did not react because Kitole’s entry was unlawful but because, as he says, he was assaulted by Kitole”.

Because the appellant did not specifically say the entry was unlawful and that he was provoked thereby, it does not necessarily follow that it did not provoke

him. The onus of proof is always upon the prosecution, it never being on the appellant to establish provocation (*Obar s/o Nyarongo v. R.* (1) (1955), 22 E.A.C.A. 422).

There was no evidence that the entry was lawful. It is not in dispute that there was tembo on the premises, but there is no evidence that the tembo was illegal liquor. On the evidence we do not think it can be taken that the liquor came within the definition of "Native Spirituous Liquor" or "Native Intoxicating Liquor" as defined in the Native Liquor Ordinance, Cap. 106. Nor is there evidence that the constables had authority under s. 4 or s. 30 of that Ordinance to search the premises. Bearing in mind that the onus of proof is on the prosecution, it must be taken that the deceased's entry into the appellant's house, and his pulling of the appellant out of the house, were unlawful acts. The learned judge did not say whether he accepted the appellant's evidence that he had gone to bed before the constables arrived; there was some support for this in the evidence of Cheruyot who said that only the second and third accused were drinking outside. Katana said all three were drinking. If the learned judge had any doubt on the matter (and in his summing-up to the assessors he said "Katana unreliable on the whole") it should be resolved in favour of the appellant. If the appellant was in fact lying on his bed and was pulled from his bed by a stranger without explanation that would be an aggravation of the unlawful acts of the deceased.

The appellant says the deceased then hit him with a stick. The learned judge did not believe this for two reasons, firstly because the doctor saw no injury on him afterward and the appellant therefore "could not possibly have received the three blows", and secondly because he considered the appellant an unreliable witness and unworthy of belief. It is not clear whether the learned judge considered the possibility of the appellant having received one blow, as was stated by Katana. At the least it is clear from Cheruyot's evidence that the appellant was struck at, if not actually struck, by the deceased. Whether the blow actually struck the appellant or not, and whether or not it was aimed at the appellant as a result of the appellant attempting to catch hold of the deceased, it was yet another act of the deceased which, on the evidence, must be taken to have been unlawful.

This series of unlawful acts by the deceased could amount to provocation under s. 209, and indeed the assessors appear to have considered that it did. With respect, however, the learned judge has failed to consider whether they did in fact amount to provocation. It may be they would not excuse an attack with a panga, but the learned judge has not considered this.

This, however, is not the only provocation to be considered. On the appellant's return with the panga he heard his father shouting and saw him bleeding from the face and, presumably, Cheruyot standing by with the stick or knife, or both as the case may be; Cheruyot says he had picked up the knife, The second accused said that he shouted that he was being killed. Cheruyot said he did not know what he was shouting as he did not understand the language. The circumstances were such that the appellant might reasonably assume there had been an unprovoked assault on his father. In our view, although such assault was not actually in view of the appellant, it was sufficiently proximate to amount to provocation under s. 209. In *Gaboye s/o Parmat v. R.* (2) (1949), 16 E.A.C.A.140, it was held in the terms of the headnote,

"That although the sight of his brother's bleeding head must have angered the appellant, there was no provocation within s. 202 of the Tanganyika Penal Code as the wrongful act was not done in the presence of the appellant."

The circumstances were that the appellant's half brother, Kameri, had been hit by the deceased. Kameri, after regaining consciousness, went to the house

where the appellant was and, his face covered in blood, told the appellant that the deceased had beaten him. The appellant then went to the deceased's hut and killed him by a blow with a knobkerrie. The court said the provisions of s. 202 of the Tanganyika Penal Code (similar to our s. 209)–

“can not possibly be stretched to cover the circumstances obtaining. Here, the appellant acted on a report he received from his brother, he then took a weapon and sought out the deceased who he found sitting in his own hut. It was no momentary act of uncontrolled passion on seeing his brother bleeding from a head wound, but a retaliatory act of revenge.”

The court went on to say further:

“we can conceive circumstances in which the act might be done in such immediate proximity to the person accused as to make the doctrine of ‘constructive’ presence possibly applicable.”

In *Okurutumu s/o Ongiro* (3)(1938), 5 E.A.C.A. 111, the appellant found his nephew, to whom he was in loco parentis, lying on the ground unconscious and the deceased standing there with a stick. The appellant ran to a nearby house, fetched his spear and killed the deceased. The court found legal provocation and altered the conviction to one of manslaughter. In *R. v. Kirangi s/o Bugangari* (4)(1940), 7 E.A.C.A. 69, the facts were somewhat similar to those in the *Gaboye* case (2), and it was held that there could be no question of legal provocation. The court distinguished the *Okurutumu* case (3), on the ground that in that case the accused acting under the influence of an honest and genuine belief that a wrongful act was being done in his presence to his nephew then and there retaliated. Whilst agreeing with the construction placed by the court in the *Gaboye* case (2), on s. 202, we think that in the circumstances of the instant case the appellant may well have held an honest and genuine belief that a wrongful act was being done in his presence to the second accused. In the particular circumstances of this case the fact that some of the acts which could result in provocation may have been committed by a person other than the deceased would not, in our view, preclude the learned judge from having regard to these acts in order to determine whether sufficient provocation existed, as, on the evidence, the appellant might reasonably have believed that they were committed by the deceased.

As has been said, the reaction of the appellant to these events was to throw his panga at the fleeing Cheruyot and to chase the deceased some 600 yards before catching up with him and striking him. 600 yards is quite a long way and it has caused us some concern whether, within the time which it would take to cover the distance, the appellant's emotion would not have changed from anger to revenge. The learned judge did not consider this aspect of the matter as he had already found there was no provocation. Learned counsel for the Crown, who does not support the conviction for murder, has referred us to the case of *R. v. Wanusu s/o Mwanjia* (5) (1939), 6 E.A.C.A.76. In that case the appellant had concealed himself in a tree and spied on the deceased, who was his wife, in flagrante delicto with her lover in a shamba. The appellant caught the deceased and took her to the place where his other wife was working, and with them then proceeded to another shamba where he taxed them with infidelity. The deceased said nothing in answer to this charge and tried to run away, but the appellant caught her and brought her back and struck her and told her to begin her story. She again said nothing and ran away and fell; the appellant followed her and stabbed her, from which she later died. The court said:

“It is quite clear that the interval of time that elapsed between the time he lost his self-control and fatally stabbed her was not long and judging him by the standard of the class to which he belongs it is reasonable to

believe that during this interval of time he continued to be swayed by passion. If there be any doubt on the point he must have the benefit of it.”

We think that was perhaps an extreme case of the application of legal provocation, as also we think was the case of *R. v. Balku* (6) (1938), 30 All. 789, cited therein. However, in the instant case, we cannot say that if the learned judge had considered the matter he must necessarily have reached the conclusion that the provocation suffered by the appellant was not sufficiently proximate to excuse an assault at the stage when the appellant caught up with the deceased.

Cheruyot says he heard the deceased call out when he was attacked that he was a constable. The provocation had, however, by then been given, and being in plain clothes, it would not necessarily follow that the appellant at that late stage, and in view of the deceased’s previous behaviour, would have believed him.

The learned judge came to no finding on whether the appellant struck all or what proportion of the blows, and there was conflicting evidence as to this. The appellant was, however, leading the chase and would appear to have been present throughout the assault on the deceased and to have associated himself with it in its entirety. In considering whether the provocation was sufficient to reduce the offence to manslaughter it is material to consider the degree of retaliation as represented by the number of blows and the lethal nature of the weapon used. Although no wound was mortal in itself, which is perhaps surprising with such a weapon, the danger in inflicting so many injuries must have been apparent. It might be that had the learned judge properly directed himself on the question of provocation he would have come to the conclusion that the retaliation was so excessive as to destroy that defence. Here again, however, we feel that the circumstances were not such as inevitably to lead to such a conclusion. We are unable to say that he would necessarily have convicted of murder, especially in view of the unanimous opinion of the assessors.

The memorandum of appeal also complains that the learned judge misdirected himself on the onus of proof of provocation. The appellant was not represented at the hearing of the appeal and it may be that the passage in the judgment to which exception is taken is where the learned judge, having convicted the appellant, referred to the assessors’ opinions and said,

“I find myself unable to accept their opinion. I have already stated my reasons why I consider the first accused is not a credible witness.”

This, standing on its own, could be read as meaning that the defence of provocation depended on the evidence led by the appellant, which we have earlier pointed out is not so. We doubt, however, especially from the learned judge’s summing-up, that this is what he meant. The mistake he made, with respect, was in failing to appreciate that there were matters disclosed by the evidence, besides those considered by him, which could amount to provocation within s. 209 of the Penal Code, and in failing to consider such matters when coming to his finding that there was not sufficient provocation.

For the reasons which we have given we allow the appeal and alter the conviction to manslaughter contrary to s. 203 of the Penal Code. We consider this to be a serious case and sentence the appellant to twelve years’ imprisonment.

Appeal allowed. Conviction of murder reduced to manslaughter.

The appellant in person.

For the respondent:

AJF Simmance (Crown Counsel, Kenya)

For the respondent:

The Attorney-General, Kenya

Chande Bin Khamis Mtumbatu and others v R
[1961] 1 EA 587 (CAZ)

Division:	Court of Appeal at Zanzibar
Date of judgment:	9 November 1961
Case Number:	140/1961
Before:	Sir Kenneth O'Connor P, Crawshaw JA and Law J
Appeal from:	H.M. High Court of Zanzibar–Horsfall, J

[1] Criminal law – Unlawful assembly – Particular of charge – Assembly with intent to commit an offence – Offence intended not specified – Whether charge defective – Penal Decree, s. 71, s.72 and s. 173 (d) (Z.) – Criminal Procedure Decree, s. 128 (Z.) – Zanzibar Criminal Procedure (Amendment) Decree, 1939 (Z.).

Editor's Summary

The appellants were charged with and convicted of assembling with intent “to commit an offence” contrary to s. 72 of the Penal Decree. Their appeals to the High Court having been dismissed they appealed again. The offence which it was alleged the appellants intended to commit was not specified in the charge and there was no evidence which would enable a finding to be made as to what offence, if any, the appellants did intend to commit. The evidence showed that four days after a state of emergency had been declared at Zanzibar a military patrol was approaching a village when a group sitting at the roadside which included the appellants saw the patrol, stood up, and began to throw knives and other weapons into the bush. The patrol stopped, surrounded and arrested the appellants and in the bush found the knives and other weapons.

Held –

- (i) under s. 71 of the Penal Decree there are two grounds upon which an assembly of three or more persons may be an unlawful assembly, (1) where they assemble with intent to commit an offence, or (2) where being assembled with intent to carry out some common purpose (not necessarily an offence), they conduct themselves in such manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace or will by such assembly needlessly and without any reasonable occasion provoke other person to commit a breach of the peace.
- (ii) to prove the charge of unlawful assembly it is sufficient if the prosecution proves either that more

than three persons including the accused assembled with intent to commit an offence or being assembled with intent to carry out some common purpose, conduct themselves as mentioned in s. 71.

- (iii) where the charge alleges assembly with intent to commit an offence it is not sufficient to prove that the accused assembled with intent to carry out some common purpose, unless the charge is amended.
- (iv) where persons are specifically charged with assembly with intent to commit an offence, the charge should specify the offence which it is alleged the accused intended to commit; in the instant case the charge preferred was defective as it did not give reasonable information of the nature of the offence charged.
- (v) in the present case there was no evidence to commit an offence of any kind and no evidence from which an inference of intention to commit an offence could properly be drawn and the evidence could not be said to exclude the reasonable hypothesis, consistent with innocence, that the appellants were carrying weapons for self-protection and threw them away in apprehension (which proved well-founded) that they would get into trouble if they were found with them by the soldiers.

Appeal allowed.

Case referred to:

(1) *R. v. Kipkering arap Koske* (1949), 16 E.A.C.A. 135.

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court:

The appellants were convicted by a resident magistrate in Zanzibar of taking part in an unlawful assembly contrary to s. 72 of the Penal Decree. They appealed to the High Court and their appeal was dismissed. They then appealed to this court. On November 6, 1961, we allowed the appeal and set aside the convictions and sentences. We now give our reasons.

The charge in the resident magistrate's court, after naming the appellants, read as follows:

“Charge (Section and Decree)

Unlawful assembly contrary to s. 72 of the Penal Decree Cap. 9 R.L.Z.

“Particulars of Offence

All the persons named above, on Monday the 5th day of June 1961 at 12 noon at Donge in the rural district of Zanzibar did assemble to commit an offence.”

The facts as summarised by the learned judge in the High Court were as follows:

“It appears that a K.A.R. motor patrol approached Donge and when a party sitting in a group on the right hand side of the road saw it they stood up and began to throw away knives and other weapons into the bush. About four persons ran away. The patrol stopped and surrounded the group and chased and caught two of the persons who had run away. The bush was searched and an axe, a bush knife, nine knives and two catapults were found. The persons surrounded and caught comprise the sixteen appellants of whom numbers thirteen, fourteen and fifteen are boys of thirteen years old. Also two or three small children were in the group who were released and not arrested.”

A further fact which the learned judge rightly stressed was that on June 1, 1961, a state of emergency had been declared by Proclamation in the Zanzibar Protectorate following election riots in the town of Zanzibar and that on the following days in early June disturbances spread to the country districts. No doubt this was why the military were patrolling the roads and why the appellants were rounded up and arrested.

It will be observed that the appellants were charged with, and convicted of, assembling with intent to commit an offence. What offence it was alleged that they intended to commit was not specified either in the charge or in the judgment of the resident magistrate and, indeed, there was no evidence which would enable a finding to be made as to what offence, if any, they did intend to commit.

The relevant sections of the Penal Decree are:

“71. *Definition of unlawful assembly and riot.* When three or more persons assemble with intent to commit an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly.

“It is immaterial that the original assembling was lawful if, being assembled, they conduct themselves with a common purpose in such a manner as aforesaid.

“When an unlawful assembly had begun to execute the purpose for which it assembled by a breach of the peace and to the terror of the public, the assembly is called a riot, and the persons assembled are said to be riotously assembled.

“72. *Punishment of unlawful assembly.* Any person who takes part in an unlawful assembly is guilty of a misdemeanour, and is liable to imprisonment for one year.”

It will be observed that under s. 71 there are two grounds upon which an assembly of three or more persons may be an unlawful assembly, that is to say: (1) where they assemble with intent to commit an offence; or (2) where, being assembled with intent to carry out some common purpose (not necessarily the commission of an offence), they conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace.

The learned judge said:

“The burden is on the prosecution to prove beyond reasonable doubt either by evidence or by irresistible inference from the evidence the elements of the offence, that is to say, that three or more persons assembled with a common intention as specified in s. 71 and conducted themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the assembly will commit a breach of the peace.”

With respect, I think that this was not correct.

It is sufficient if the prosecution proves either (1) or (2) above—either that more than three persons including the accused assembled with intent to commit an offence; *or* being assembled with intent to carry out some common purpose, conducted themselves as mentioned in s. 71. The Crown may, of prove both (1) and (2). But where the charge is laid under (1) only, it is not sufficient to prove (2) unless the charge is amended. In the present case the appellants were charged that they “did assemble to commit an offence” and were convicted by the resident magistrate of assembling with intent to commit an offence.

The learned judge said:

“From the proved facts arising in this setting the magistrate was entitled to infer that the accused had assembled with intent to commit an offence. It is true that the judgment does not state what offence it is which the magistrate found that the group intended to commit nor that their conduct gave rise to reasonable alarm in the neighbourhood that a breach of the peace would be committed. In my opinion these omissions from the findings have not occasioned any failure of justice since it is an inescapable inference from the rest of the magistrate’s findings in his judgment, and indeed on the body of evidence which the magistrate believed, that these appellants were assembled with intent to commit a breach of the peace (to say the least) (see s. 173 (d) of the Penal Decree) and that such assembly in the disturbed condition then prevailing must have caused fear in the neighbourhood.”

With respect, there was no evidence that the appellants, sitting with children by the road side, intended to commit a breach of the peace or must have caused fear in the neighbourhood. In any event they were not so charged. What

they were charged with was assembling to commit an offence, not with assembly and conduct reasonably causing fear of a breach of the peace. The learned judge suggested (though the magistrate had not so found) that the offence which the assembly intended to commit might be an offence against s. 173 (d) of the Penal Decree. Section 173 is a section which deals with idle and disorderly persons and provides in para. (d) that every person who in any public place conducts himself in a manner likely to cause a breach of the peace shall be deemed an idle and disorderly person and be liable to imprisonment for one month. With respect, I doubt very much whether the magistrate had that offence in mind when he convicted the appellant of assembling with intent to commit an offence. Certainly the Crown had not, since we were told by learned Crown Counsel on appeal that what the Crown had in mind was assault on passers-by riotous interference with vehicles on the road.

In our opinion, when persons are specifically charged under the first limb of s. 71 of the Penal Decree with assembling with intent to commit an offence, the charge should specify the offence which it is alleged that they intended to commit. Section 128 of the Criminal Procedure Decree (as replaced by the Criminal Procedure (Amendment) Decree, 1939) requires every formal charge, in addition to stating the offence, to contain such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. The charge in this case did not give reasonable information of the nature of the offence charged, in that it did not indicate what the offence was which it was alleged that the accused persons assembled to commit. It seems to us that an accused person is entitled to have reasonable information of what he is alleged to have done; for instance whether it is alleged that he assembled in a group of idle and disorderly persons, or with the intention of committing assault upon passers-by on the highway, or riotous interference with vehicles, or house-breaking, or robbery, or rape, or whatever other intention the prosecution will seek to prove. He is entitled to know in what species of unlawful assembly he is charged with participating. He cannot adequately frame his defence if he is not informed of this. Moreover, he is entitled to know with precision when the case is over of what offence he has been convicted. Learned Crown Counsel pointed out that on a charge of rioting it is sufficient in England to charge the accused with having riotously assembled together. That is not an analogy. The elements of the offence of rioting in England are sufficiently known. The elements of the offence of assembling to commit an offence may not be sufficiently known unless the offence is specified. I think that the charge in this case was defective. That would not, however, necessarily justify an appellant court in upsetting the conviction. If, for instance, the intention of the assembly sufficiently appeared from evidence of a common move to commit an offence e.g. if the assembly started to break into someone's shop, it might be said that the failure to specify in the charge an intention to commit the offence of shop-breaking had not caused a failure of justice. But there is nothing of that kind here. There was, in the present case, no move to commit an offence of any kind and no evidence from which an inference of an intention to commit an offence could properly be drawn. The evidence here was that the appellants were sitting by the road side with young children with them. They apparently had among them an axe and a bush knife (which in addition to being potentially offensive weapons are agricultural implements), nine knives (of what sorts were not specified) and two catapults (presumably belonging to the children). There is nothing to show that they did not have these, if not for peaceful purposes, for self-protection in the disturbed state of the country. When they saw the soldiers coming, they may well have thought that they would get into trouble if they were found with weapons, and have thrown them away in fear.

In *R. v. Kipkering arap Koske* (1) (1949), 16 E.A.C.A.135 this court held:

“ . . . in order to justify on circumstantial evidence the inference of

guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden which never shifts to the accused.”

That principle is well known and has since been reiterated by this court on various occasions. The learned magistrate did not give himself the necessary direction in this case—a case depending entirely on circumstantial evidence. In our opinion, the evidence in this case could not be said to have excluded the reasonable hypothesis, consistent with the appellants’ innocence, that they carried weapons for self-protection and threw them away in apprehension (which proved well-founded) that they would get into trouble if they were found with them by the soldiers, and that they did not intend to commit any offence.

For these reasons we allowed the appeal.

Appeal allowed.

For the appellants:

KS Talati

For the respondent:

WJ Dourado (Crown Counsel, Zanzibar)

For the appellants:

Advocates: *Wiggins & Stephens*, Zanzibar

For the respondent:

The Attorney-General, Zanzibar

R v Damas s/o Herman
[1961] 1 EA 591 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	17 November 1961
Case Number:	158/1961
Before:	Sir Alastair Forbes V-P, Crawshaw and Newbold JJA
Appeal from:	H.M. High Court of Tanganyika—Weston, J

[1] *Criminal law – Burglary and housebreaking – Distinction – Housebreaking committed at night charged and proved – Whether in charge of housebreaking necessary to prove offence committed other than at night – Penal code, s. 258 (1), s. 265 and s. 294 (T.).*

Editor's Summary

The respondent was convicted by a district court on two counts of housebreaking and stealing respectively. On appeal the High Court quashed the conviction of housebreaking holding in effect that the offences of burglary and housebreaking under s. 294 of the Penal Code were distinct offences, one being committed only at night and the other only during the day, and that since there was no evidence of the time of day or night when the premises were broken and entered, the conviction was bad in law. The Crown appealed.

Held –

- (i) under s. 294 of the Penal Code burglary is not a completely different offence from but an aggravated form of housebreaking which carries an enhanced sentence if the additional element, commission in the night, is both charged in the count and proved at the trial.
- (ii) if the additional element is either not charged or, if so charged, is not proved, the offence is nevertheless housebreaking, no matter at what time it may be committed.

Appeal allowed. Conviction and sentence restored.

Case referred to:

(1) *R. v. Compton*, 172 E.R. 482.

Judgment

The following judgment prepared by **Newbold JA**: was read by direction of the court:

The respondent was convicted in the district court of Songea at Songea on two counts, one charging housebreaking contrary to s. 294 (1) of the Penal Code and the other stealing contrary to s. 258 (1) and s. 265 of the Penal Code, and was sentenced to two years' imprisonment on each count, the sentences to run concurrently, and on the expiration of his sentence he was ordered to undergo police supervision for three years. The sentence was subject to confirmation of the High Court of Tanganyika. The respondent appealed to the High Court against the conviction. On September 27, 1961, the High Court allowed the appeal against the conviction on the count charging housebreaking, quashed the conviction thereon and set aside the sentence imposed in respect of it, but dismissed the appeal against the conviction on the count charging stealing and confirmed the sentence of imprisonment and the order for police supervision.

An appeal against that part of the decision of the High Court which quashed the conviction in respect of the count of housebreaking and set aside the sentence in respect thereof was brought in the name of the Director of Public Prosecutions on grounds which, in effect, were that the learned judge erred in law in holding that the offences of burglary and housebreaking contrary to s. 294 of the Penal Code were completely distinct offences, the one being committed only at night and the other only during the day. On the appeal first coming before us the respondent was not served and the appeal was stood over to another date for service, and at the same time we drew the attention of the Crown Counsel to the title in which the appeal had been brought. On the appeal coming on for hearing Crown Counsel stated that the appeal had been brought in the wrong name and applied for an amendment of the appeal record in order to substitute Regina for the director of public prosecutions. As the application related to a purely formal matter and did not in any way prejudice the respondent we granted the application and made the order accordingly; the appellant was neither present nor represented. The appeal was then heard and at the end thereof we allowed the appeal, ordered that the judgment of the High Court in so far as it quashed the conviction on the count of housebreaking and set aside the sentence of two years' imprisonment in respect thereof, be set aside, restored the conviction and sentence of the learned magistrate on the count of housebreaking and stated that we would give our reasons in writing.

Section 294. of the Penal Code is as follows:

“294. Any person who:

- (1) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
- (2) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony in there in, or having committed a felony in any such building, tent or vessel, breaks out thereof,

is guilty of the felony termed ‘housebreaking’ and is liable to imprisonment for seven years.

“If the offence is committed in the night, it is termed ‘burglary’ and the offender is liable to imprisonment for ten years.”

The learned magistrate convicted the respondent of the offence of house-breaking, the particulars charged being that the respondent, in the month of July, 1961, at Mbinga village in the district of Songea did break and enter the dwelling house of Spirian s/o Kasian with intent to steal therein. On appeal the learned judge of the High Court stated that the evidence justified a conviction and continued as follows:

“I am in some doubt however whether it justified the conviction for housebreaking recorded here. The time of day or night at which the complainant’s premises were broken and entered was not in evidence, and, I am not attracted by learned Crown Counsel’s argument that the offence committed must have been housebreaking at least. I think it is based on an extension of the presumption set out in illustration (a) to s. 114 of the Indian Evidence Act which is unwarranted by the authorities. The court may presume, in the words of the statute, ‘that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.’ Furthermore, as was said by Sir Barclay Nihill, C.J., Kenya, delivering the judgment of the Court of Appeal for Eastern Africa in *R. v. Bakaro s/o Abdulla* (1949), E.A.C.A. 84:

‘Cases do not often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well, and if all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal.’

“But in all such cases there was no doubt about the offence with which the possession of recently stolen property linked the prisoner (e.g. burglary as in *R. v. Hassani s/o Mohamed alias Kinyonyoke* (1948), 15 E.A.C.A. 121, arson as in *R. v. Bakari s/o Abdullah* op. cit., murder as in *R. v. Yego s/o Kitum* (1937), 4 E.A.C.A. 25). It is novel doctrine to me that where the court is unable to say, as in this case, in which of two offences such possession implicates the accused, it is justified in making what can only be an arbitrary choice, even if, as if to salve its conscience for such random action it chooses the less serious of the two offences. Whatever may be the position in the world of mathematics, it is not in law axiomatic that the greater includes the less, otherwise e.g. a prisoner charged with an attempt could not plead the completed offence, as, at common law at least, it appears he could in certain cases.

“I think, therefore, that the appellant’s conviction on the first count, that is to say for housebreaking contrary to s. 294 (1) of the Penal Code, is bad in law.”

We understand the learned judge to be saying in this passage that on a count of housebreaking the accused may only be convicted if the offence is proved to have been committed at some time other than in the night. With respect to the learned judge we do not agree that such is the law. Under s. 294 of the Penal Code burglary is not a completely different offence from housebreaking but an aggravated form of housebreaking which carries an enhanced sentence if the additional element, commission in the night, is both charged in the count and proved at the trial. If the additional element is either not charged in the count or, if so charged, is not proved at the trial, the offence is nevertheless housebreaking, no matter at what time it may be committed. As was said by Gaselee, J., in *R. v. Compton* (1), 172 E.R. 482:

“ . . . if they [the jury] think the breaking was not in the night time but that there was a breaking and goods stolen of any value they may convict the prisoners of housebreaking . . . ”

That passage relates to the case where the additional element is charged but not proved. In Archbold's Criminal Pleading (34th Edn.), p. 687, the learned editors, in a passage which we consider a correct statement of the law, deal with the converse position, that is, where the additional element is proved but not charged, and state:

“if it [the breaking and entering] is proved to have been done in the night time, so as to amount to burglary, the prisoner may notwithstanding be convicted upon this indictment”

(housebreaking).

For these reasons we allowed the appeal, set aside the judgment of the learned judge on this point and restored the conviction and sentence of the learned magistrate.

Appeal allowed. Conviction and sentence restored.

For the appellant:

AM Troup (Crown Counsel, Tanganyika)

The respondent did not appear and was not represented.

For the respondent:

The Attorney-General, Tanganyika

Trustees of Sheikh Fazal Ilahi Sons Trust v The Commissioner of Income Tax [1961] 1 EA 594 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	2 October 1961
Case Number:	7/1960
Before:	Sir Kenneth O'Connor P, Sir Trevor Gould and Crawshaw JJA
Appeal from:	H.M. Supreme Court of Kenya—Mayers, J

[1] *Income Tax – Penalties – Trustees – No return made for ten years – Penalty of treble the tax assessed – Commissioner's discretion to remit all or part of penalty – Appeal – Whether appellate court can interfere with exercise of discretion – East African Income Tax (Management) Act, 1952, s. 40, s. 50, s. 71 (1), s. 72, s. 78, s. 86 – Income Tax Ordinance (Cap.254), s. 28, s. 62 (K.) – Inland Revenue Regulation Act, 1890 – Taxes Management Act, 1880, s. 57 (3), s. 59 – Finance Act, 1923, s. 23 (2) – Income Tax Act, 1918, s. 107, s. 222 – Income Tax Act, 1952, s. 25 (3), s. 500 – Wheat Industry Ordinance, 1952 (K.).*

[2] *Costs – Income tax appeal – Penalties – Offer to reduce penalties made when appeal heard – Offer*

rejected – Judgment given reducing penalties to amount offered – Commissioner awarded costs of appeal – Whether judge correctly exercised his discretion to award costs.

Editor's Summary

Until 1952 the trustees of a charitable trust created in 1942 made no returns of income to the Commissioner. In April, 1952, at the written request of the Commissioner the trust deed was submitted to him after which forms of return were sent to the trustees for completion. The trustees objected to making these returns on the ground that the trust income had been distributed among the beneficiaries whose personal tax returns should suffice, but after correspondence the returns were in February, 1953, completed and submitted. Notices of assessment were duly issued which included penalties amounting to treble the tax claimed. Notices of objection were given by the trustees and these were

followed by notices of refusal. The trustees then appealed to the local committee which allowed the appeals in respect of the years prior to 1947 and disallowed those for the subsequent years. On appeal against the decision of the local committee in respect of the assessments for the years subsequent to 1946 the Commissioner offered when the hearing began to agree to a reduction of the penalties to 130 per cent. of the tax but the trustees rejected this offer. The hearing continued and the judgment of the Supreme Court reduced the penalties from 300 per cent. to 130 per cent. but did not interfere with the Commissioner's refusal to grant certain allowances claimed and gave the Commissioner the costs of the appeal. The trustees further appealed against the sufficiency of the reduction of the additional tax and against the judge's refusal to grant an allowance claimed for an industrial building and against the award of costs to the Commissioner.

Held –

- (i) without finally deciding whether an appeal lies against the exercise by the Commissioner of his discretion whether to remit the whole or any part of the additional tax charged under s. 40 of the East African Income Tax (Management) Act, 1952, these were bad cases of default and there were no grounds for interfering with the manner in which the judge had exercised his discretion in dealing with the penalties even if the court had power to do so.
- (ii) there was so little evidence of the age or value of the building for which the trustees had claimed an industrial building allowance that it was not possible for the court to find a value for it.
- (iii) since the trustees had refused to accept the Commissioner's offer to agree to a reduced penalty of 130 per cent., the Commissioner had no alternative except to contest the appeal in the Supreme Court and accordingly in the exercise of his discretion the judge was entitled to award the costs of the appeal to the Commissioner.

Appeal dismissed.

Cases referred to:

- (1) *Mandavia v. The Commissioner of Income Tax* (Case 59), 2 E.A.T.C. 426.
- (2) *Mandavia v. The Commissioner of Income Tax* (1956), 23 E.A.C.A. 303.
- (3) *The Trustees of the Sheikh Fazal Ilahi Noordin Charitable Trust v. The Commissioner of Income Tax*, [1957] E.A. 616 (C.A.).
- (4) *The Lord Advocate v. McLaren*, 5 T.C. 110.
- (5) *Inland Revenue Commissioners v. Hinchy*, [1959] 2 All E.R. 512.
- (6) *Inland Revenue Commissioners v. Hinchy*, [1960] A.C. 748; [1960] 1 All E.R. 505.
- (7) *Fulham Borough Council v. Santilli*, [1933] 2 K.B. 357.
- (8) *Croydon Corporation v. Thomas*, [1947] 1 K.B. 386.
- (9) *Stepney Borough Council v. Joffe and Others*, [1949] 1 All E.R. 256.
- (10) *Liversidge v. Anderson*, [1941] 3 All E.R. 338.
- (11) *Kenya Aluminium & Industrial Works Ltd. v. Minister for Agriculture, Animal Husbandry and*

Water Resources, [1961] E.A. 248 (C.A.).

October 2. The following judgments were read:

Judgment

Crawshaw JA: This is an appeal by the trustees of the Sheikh Fazal Ilahi Sons Trust against a judgment of the Supreme Court of Kenya relating to eight consolidated appeals against assessment.

The appellants were assessed to tax in respect of the years of assessment 1943 to 1951 inclusive, and in respect of the years of income 1951 to 1953 inclusive. Additional tax was added to each by way of penalty amounting to treble the

basic assessment. The appellants appealed to the local committee (hereinafter referred to as “the committee”) which allowed the appeals in respect of the years prior to 1947, but disallowed them in respect of the subsequent years, in terms which will be set out hereafter. The appellants appealed to the Supreme Court in respect of the years subsequent to 1946, and the Supreme Court reduced the additional tax in each case from 300 per cent. to 130 per cent., but did not interfere with the Commissioner’s refusal of certain of the allowances claimed. The appellants have now appealed to this court against the sufficiency of the reduction in the additional tax, and against the decision in respect of an allowance claimed on an industrial building.

To appreciate the grounds of appeal it is necessary to review the circumstances in which the basic assessment and penalty tax were imposed. The trust was created in 1942 but no returns of income were made to the Commissioner. On February 6, 1952, the Commissioner wrote to the appellants asking that the trust deed be sent for perusal. This was sent on April 5, 1952, and on April 29, income tax return forms were sent to the appellants for completion in respect of the years 1943 to 1952. The appellants apparently objected to making these returns on the basis that the income from the trust had been distributed amongst the beneficiaries of the trust, and that their personal tax returns should be sufficient. It would seem that there was correspondence in this connection between the appellants and the Commissioner, and it was not until February 16, 1953, that the forms sent to the appellants on April 27, 1952, were completed and returned to the Commissioner with accounts in support.

Notices of assessment were issued on November 30, 1953, in respect of the years of assessment up to and including 1951, based on the income declared by the appellants in their returns. On December 28, 1953, the appellants gave to the Commissioner written notice of objection, still on the ground that the beneficiaries had themselves included the income in their returns. On February 27, 1954, the Commissioner wrote saying that the trust had been properly assessed and, apparently receiving no reply thereto, wrote on June 25, 1954, referring to his letter of February 27, and asking if the appellants now agreed to withdraw their appeals against the “normal tax”. Further correspondence ensued and, on February 26, 1955, the Commissioner gave notice of refusal of the objection.

On January 31, 1955, the Commissioner issued notices of assessment in respect of the years of income 1951 to 1953 inclusive, the appellants having failed to declare liability to income tax in respect of those years as required by s. 50 of the East African Income Tax (Management) Act, 1952 (hereinafter referred to as “the 1952 Act”). On March 2, 1955, the appellants gave written notice of objection to these assessments also, on the basis that a loss had been incurred during those years and that no tax was due, and on March 17, 1955, the Commissioner issued notices of refusal to these objections.

The appellants appealed to the committee whose decision was given in November, 1956, in the following terms:

- “(a) Years of Assessment 1943/46. In the opinion of the committee, we feel there was no wilful default.
- (b) Years of Assessment 1947/1951. Tax and full additional tax due for payment as assessed.
- (c) Years of Income 1951/53. Tax is due plus full additional tax, but new accounts can be submitted through qualified accountants acceptable to the Commissioner. To submit final figures within six weeks’ time.”

The Commissioner did not appeal in respect of the years 1943/46, and the effect of the committee’s decision in respect of those years was to render the assessments time-barred by virtue of s. 72 of the 1952 Act. That section limits the

period under which an income can be assessed to tax, to seven years from the year of income unless there has been “any fraud or wilful default”.

The appellants, being dissatisfied with the committee’s decision in respect of the years after 1946, appealed to the Supreme Court on January 22, 1957, against the assessments for those years. The years of assessment 1947 to 1951 inclusive were referred to in the Supreme Court as Group A, and the years of income 1951 to 1953 as Group B, and it will be convenient so to refer to them here. In this connection the learned judge said:

“The appeals fall into two distinct groups hereinafter referred to as Group ‘A’ and Group ‘B’ respectively. Group ‘A’ comprises appeals in relation to assessments to income tax raised under the Kenya Income Tax Ordinance, Cap. 254, in respect of the Years of Assessment 1947 to 1951 inclusive and Group ‘B’ appeals in relation to assessments raised under the High Commission Income Tax Act, 1952, in respect of Years of Income 1951 to 1953. Nothing turns, however, upon the difference in the legislation under which the two groups of assessment were raised, nor does anything turn upon the fact that both the Income Tax Ordinance (Kenya) and the High Commission Income Tax Act, 1952, have been repealed. There is, however, a distinction between Groups ‘A’ and ‘B’ in that the only point argued before this court in relation to appeals comprised in Group ‘A’ was that, for reasons hereinafter dealt with in some detail, the penalty imposed for failure to make income tax returns promptly either ought not to have been imposed at all, or was excessive. As regards Group ‘B’, however, it will be necessary to consider not only the quantum of the penalty, but also certain matters in relation to the assessment to tax strictly so called.”

The Income Tax Ordinance will be referred to as “Cap. 254”. The 1952 Act came into operation on January 1, 1951, and it is common ground that the relevant provisions of that Act and of Cap. 254 for the purposes of this appeal are substantially the same; it is to the sections of the 1952 Act to which this court has been referred, as was the court below, and to which I will refer.

The appeals were consolidated in the Supreme Court, as they have been in this court. In their prayer to the Supreme Court the appellants asked in respect of all the appeals that:

- “(a) the assessment be varied so as to exclude any additional tax; or
- (b) the assessment be varied so as to reduce the amount of additional tax imposed; and
- (c) for such further or other relief as this honourable court may see fit to grant, together with the costs of this appeal.”

In respect of Group B it was asked in addition:

“That the assessment be varied so as to tax only the income shown by the new accounts.”

This presumably related to the new accounts provided for in para. (c) of the committee’s decision.

The relevant part of s. 40 of the 1952 Act (similar to s. 28 of Cap. 254) reads:

“40(1) Any person who:

- (a) makes default in furnishing a return or fails to give notice to the Commissioner as required by the provisions of s. 59, in respect of any years of income shall be chargeable for such year of income with treble the amount of tax for which he is liable for that year under the provisions of s. 36 to s. 39 inclusive;

.....

and shall be required to pay such amount of tax in addition to the tax properly chargeable in respect of his true total income.

- (2) If the Commissioner is satisfied that the default in rendering the return or any such omission was not due to any fraud, or gross or wilful neglect, he shall remit the whole of the said treble tax and in any other case may remit such part or all of the said treble tax as he may think fit.”

The learned judge said:

“The local committee held that the failure to make returns in respect of the years 1943–1946 was not due to wilful default and therefore proceedings in respect of those years were time-barred under s. 72 (a). This conclusion is wholly irreconcilable with the decisions of the local committee in relation to the assessments falling into Groups ‘A’ and ‘B’, returns in relation to which had not been made for the same reasons as those for which returns had not been made in the period 1943 to 1946. Here again, however, nothing turns upon this inasmuch as it is clear that when an appeal is taken from the decision of the local committee to the Supreme Court, the Supreme Court is to rehear the matter and is in no way bound by the findings of the local committee.”

It is true that under s. 78 (similar to s. 62 of Cap. 254) an appeal is against the assessment, and I do not understand Mr. Bechgaard to submit that the powers of the court were in any way limited by the findings of the committee.

In all the memoranda of appeal before the lower court it was, however, alleged that the committee, having found there was no wilful default in respect of the earlier years, erred in holding that additional tax was payable in respect of the later years, and that in any event the committee

“failed to address themselves judicially to the question of what was the proper quantum of additional tax (if any) in the circumstances of the case”.

On these issues the learned judge granted the relief asked for in (b), that the amount of additional tax be reduced. He held that although there was nothing to suggest that the trustees were motivated by any fraudulent intent:

“It is difficult to believe that the trustees of this trust could at any period possibly have been unaware that, in general at least, trustees are required to make a return of the income of the trust of which they are trustees. Moreover, the appellants having, whatever may have been their original state of mind, been given express notice of their obligation to make returns of the trust income by reason of their having been issued with income tax return forms in respect of the years of assessment 1943 to 1952, both inclusive, on April 29, 1952, their omission to make any returns in respect of the years of income 1951, 1952 and 1953 until they were issued with notices of assessment in respect of those years, on January 31, 1955, clearly constitutes, in respect of those years, wilful default. Wilful default means the intentional failure to do something which one is under a legal obligation to do. If the trustees were in fact aware that they were under a legal obligation to make returns, but intentionally abstained from so doing because they thought that those returns would serve no useful purpose inasmuch as the beneficiaries of the trust were under a legal obligation to include in their individual returns any income derived from the trust, there can be no doubt that the trustees were in wilful default. The motive for this default is immaterial. To hold otherwise would be to open the door to tax evasion upon a considerable scale because, although it very well may be that in the instant case no prejudice was or could have been suffered by the revenue, it is clear that unless trustees make a return of the trust income, it might be

most difficult for the revenue authorities to ascertain whether or not any beneficiary had in fact included in his personal income return income derived by him from the trust fund. If the trustees were not aware prior to 1952 that they were under an obligation to make a return in respect of the trust income, it appears to me that their failure, having regard to the size of the trust, to obtain advice as to whether or not they were liable to make a return, in itself constitutes gross neglect.”

The learned judge found therefore that in respect of the years of income 1951 to 1953 the trustees were responsible for wilful default, and in respect of the other years for gross neglect. Mr. Bechgaard points out that the wording of s. 40(2) is “wilful neglect” and not “wilful default”, but he does not lay any stress on this. It is to be observed that earlier in the same paragraph the learned judge had used the correct expression “wilful neglect”.

Had there (at least in the opinion of the Commissioner) not been gross or wilful neglect by the trustees, then the Commissioner would, under s. 40 (2) have had to remit the whole of the penalty, and the question of quantum would not arise. The trustees in their appeal to this court have not, however, as I see it, made it a ground thereof that the learned judge was wrong to find wilful or gross neglect and that he should have remitted the whole penalty, but only that the circumstances were such that he should have reduced it to a greater extent. The first ground in the memorandum of appeal to this court reads:

- “1. That in relation to the appeals against Notices of Assessments for the Year of Assessment 1947 to Year of Income 1953 inclusive, the learned judge, having found that the failure to make returns was not inspired by any fraudulent motive and had not in fact entailed a loss to the revenue, erred in only reducing the statutory treble penalty to 130 per cent.”

Mr. Bechgaard in addressing this court disagreed with the learned judge’s view as to what constituted “wilful default” and raised other arguments which could have been directed at the finding that there was gross or wilful neglect. It seems, however, that his arguments were not so directed and that he was using them only in support of his claim that in the special circumstances of this case the penalty should be a token one and not substantial. He informed the court he could not argue that there was no evidence on which the learned judge could rely for allowing some additional tax, and that he had not done so in the lower court, but he asked this court to reconsider the quantum.

This necessarily introduces the question whether a right of appeal lies against the exercise by the Commissioner of his discretion in remitting the whole or any part of the penalty. A right of appeal to a committee or a judge is given in Part XI of the 1952 Act to any person “aggrieved by an assessment made upon him”. It seems to me that it could be argued that this refers only to a basic assessment made by the Commissioner under Part X of the Act, and would not include additional tax in the nature of penalty which is prescribed under s. 40 and which, subject to relief in certain circumstances, is fixed; if this was so no appeal would lie against the penalty. The point was not taken either before the committee or the Supreme Court nor, except in answer to a question from the bench, before this court, but being one of jurisdiction it is proper for this court to consider it. There have been appeals in the Supreme Court and before this court where the quantum of penalty has been considered without, it would seem, the question of jurisdiction being argued. In *Mandavia v. The Commissioner of Income Tax* (1), (Case 59) 2 E.A.T.C. 426 on an appeal from the Commissioner to the Supreme Court, the learned judge said, at p. 445: “I have a discretion to remit that tax” (the treble tax) “and I propose to do so”. On further appeal, this court recognised, *Mandavia v. The Commissioner of Income Tax* (2) (1956), 23 E.A.C.A. 303 at 312, the right of a court on appeal to interfere

with the quantum of penalty by making certain orders in relation thereto. An appeal to the Privy Council was successful, but on grounds unconnected with the quantum of penalty: *The Trustees of the Sheikh Fazal Ilahi Noordin Charitable Trust v. The Commissioner of Income Tax* (3), [1957] E.A. 616 (C.A.) where Sinclair, V.-P. (as he then was) in a judgment to which the other members of the court agreed, said at p. 626 in relation to penalties:

“I think it is open to us to determine whether they should be confirmed or remitted either wholly or in part”, and then observed that this was the course adopted in the *Mandavia* case (2).

Section 25 (3) of the English Income Tax Act, 1952, makes provision for treble tax to be paid in certain cases of default and s. 500 of that Act allows Commissioners of Income Tax “in their discretion” to mitigate the amount thereof, and the Treasury is given like power. Referring to these powers of mitigation, Simon on Income Tax (2nd Edn.) Vol. 1, para. 425 says, “the court, however, has no such power” and refers to *The Lord Advocate v. McLaren* (4) (1905), 5 T.C. 110, where the Court of Exchequer had remitted the treble penalty. In that case, the relevant part of the headnote reads:

“it is not within the competence of the court to modify the penalty imposed by the section”,

(s. 166 of the Income Tax Act, 1842, hereinafter referred to as “the 1842 Act”). The Lord Ordinary had said,

“I have always held it quite within the competence of the Court of Exchequer to modify a penalty where it thought proper to do so in the interests of justice.”

On appeal to the Court of Session, Lord Adam referred to this passage and said at p. 113:

“I confess that it appears to me that when a statute says that an offender shall forfeit a particular sum (as, in this case, treble the duty chargeable), the court must obey the direction, and pronounce an order accordingly. It may be, nevertheless, that the Court of Exchequer has power to modify such a penalty, but if so I think it must be made very clear that the court has the power.”

He then reviewed the general powers of the Court of Exchequer under a statute of Queen Anne (c. 53) and held that they did not extend “to penalties such as this at all”, and added,

“No evidence was laid before us that the Court of Exchequer in England is or had been in use to remit or modify a penalty, as had been done in this case.”

Lord Kinnear, agreeing with Lord Adam, said,

“it is not competent to modify the penalty. It is not left to the discretion of the court, but is fixed absolutely by statute, and the court can have no power to alter what is so fixed unless the statute confers it.”

The Lord President put it rather differently when he said at p. 116:

“There is also no doubt that we, sitting as the Court of Exchequer, are, so to speak, the heirs of the judicial functions, not of the administrative, and I think this power of modifying the penalty, if it existed, was certainly part of the administrative function, and is represented now by the undoubted power which the Commissioners of Inland Revenue have to modify

any penalty they please; and with your Lordship I am greatly strengthened in this view by finding, what I take to be proved by the authoritative statement at the bar, namely, that the Court of Exchequer in England have never conceived that they had this general power of modifying any penalty.”

Sections 166 and s. 178 of the 1842 Act provided for treble tax in certain cases, and s. 35(1) of the Inland Revenue Regulation Act, 1890 (Ch. 21) gave powers of mitigation to the Commissioners and Treasury similar to those contained in s. 500 of the English Act of 1952. Mr. Bechgaard has observed that under our laws additional, or penalty, tax is charged as part of the assessment, but this has likewise been the case, I think, throughout the history of income tax in England (s.185 of the 1842 Act and s. 69 of the Taxes Management Act, 1880 (Ch. 19) and subsequent legislation); it is no doubt administratively convenient.

At the time the *McLaren* case (4) was heard the relevant statutory provisions relating to appeals would appear to have been s. 57 (3) and s. 59 of the Taxes Management Act, 1880. Section 57 (3) provided for appeals to the General Commissioners by “a person aggrieved by the assessment upon him”. Section 59 (1) provided that an appellant “if dissatisfied with the determination” (of the General Commissioners) “as being erroneous in point of law”, might require the Commissioners to state a case for the opinion of the High Court. The High Court, on a case being stated, was given powers under s. 59 (2) (b) which appear to be as wide as those given to the Supreme Court on appeal under s. 78 (b) of our 1952 Act. Under s. 59 (3) of the Taxes Management Act, 1880, an appeal from the High Court lay to the Court of Appeal and thence to the House of Lords

“and from the decision of the Court of Session, as the Court of Exchequer in Scotland, upon any case so stated to the House of Lords.”

Section 78 of our 1952 Act admittedly does not restrict appeals to the Supreme Court to points of law, but sub-s. 10 provides that:

“No appeal shall lie from the decision of a judge except on a question of law or of mixed law and fact”.

I understand Mr. Bechgaard’s argument to be that in all the circumstances of the instant case the Commissioner should have exercised his powers in reducing the penalty, and to a greater extent than the lower court did. This appeal involves the submission that the Commissioner did not exercise his discretion judicially, which is a matter of law; so also I should have thought would be the modification of a penalty “in the interests of justice”, to use the words of the Lord Ordinary in the *McLaren* case (4). As I see it, the Court of Session in the *McLaren* case (4) did not hold that it was incompetent for the Lord Ordinary to modify the penalty on the ground that the appeal relating thereto was not on a point of law, but on the ground that the income tax laws provided a statutory penalty which only the Commissioner and the Treasury within their administrative powers could mitigate, and not the court. This I must say is how I read the provisions of our own law.

Although I have found no English case in which the court has had to decide whether or not it had power to mitigate a penalty, I would refer to the *Inland Revenue Commissioners v. Hinchy* (5), [1959] 2 All E.R. 512, where at p. 521 Lord Evershed, M.R., delivering the judgment of the Court of Appeal said:

“The startling feature of the present legislation is that, however extravagant the result, the court is now bound to forfeit the full penalty and the Crown may to that end invoke s. 25 (3) even though the more appropriate section, according to the facts of the case, might appear to be s. 48 or s. 49—neither of which exacts, even though the case be one involving fraud, anything like so extreme a forfeit. The remedy of the subject is left to the

power of the Treasury (or the Commissioners) to mitigate the penalty or stop the proceedings under s. 500 or s. 55. As we have earlier said, we cannot think the result either just, sensible or satisfactory, however well and conscientiously the discretions be exercised.”

The court would therefore appear to have been of the opinion that it had no power to interfere with the quantum of the penalty. The decision of the Court of Appeal was reversed by the House of Lords, *Inland Revenue Commissioners v. Hinchy* (6), [1960] A.C. 748, but the question of mitigation was in neither court in issue, the question before the courts being whether the penalty was chargeable on the whole assessed tax which ought to be charged or only on that part to which the taxpayer would have been assessed had it not been for his default. Viscount Kilmuir, L.C., in his judgment following appeal to the House of Lords, summarised at p. 759 a part of the argument for the Crown before the judge of first instance as being:

“The penalty imposed by the said s. 25 (3), in the case of proceedings by action in a court, is a fixed penalty which the court (unlike the General Commissioners, in proceedings brought before those Commissioners) has been given by the legislature no power to mitigate but which the Commissioners of Inland Revenue or the Treasury may mitigate under s. 500 of the Act.”

Viscount Kilmuir did not say whether he accepted this part of the argument, but Lord Reid at p. 763 said:

“My Lords, if the appellants, the Commissioners of Inland Revenue, are right in their contention, any taxpayer who makes a mistake in his annual income tax return and has not discovered and rectified it must, if he is sued, be subjected by the court to a penalty of £20 and treble the whole tax which he ought to be charged for the year; that penalty is in addition to the tax which he normally has to pay. It does not matter how innocent the mistake may have been or how large the penalty may be, the court has no power to modify or reduce the penalty, although such a penalty, with the modern rates of income tax, would be ruinous to most taxpayers with moderate or large incomes. The commissioners maintain that the only remedy lies with them, and that it is for them in their sole and unfettered discretion (unless the Treasury choose to interfere) to determine what they think would be a proper penalty in each case and to reduce the penalty imposed by the court accordingly.”

Later in his judgment he said at p. 768:

“It is so contrary to the practice of Parliament to commit in effect unlimited discretion to a branch of the executive as to the amount of penalties to be imposed on persons guilty of no more than negligence that I would not easily hold that this was made in 1923; but I am forced to the conclusion that this was then done, and it is idle to speculate whether Parliament, or, indeed, any member of Parliament, understood the full effect of the enactment.”

Reference to “1923” is to the Finance Act, 1923, s. 23 (2) of which, read with s. 107 (relating to penalties for neglect to deliver lists, declarations and statements) of the Income Tax Act, 1918, provided for treble tax even when no fraud was involved. Section 222 of the 1918 Act enabled the Commissioners or Treasury in their discretion to mitigate any penalty. Lord Reid appears therefore to have accepted the submissions of the Commissioners on their and the Treasury’s exclusive right to mitigate, and none of their lordships has, by inference or otherwise, taken a different view.

Although for the reasons I have given I am at present of the opinion that no appeal lies in respect of the quantum of penalty, it would not be altogether satisfactory to base a decision in this appeal solely on that ground, the point not having been fully argued before us, and in view of the fact that this court has on previous occasions recognised the right of appeal. I do not, however, think that such recognition binds us, for so far as I am aware the point has not before been made an issue or argued.

Supposing the lower court had jurisdiction to entertain the appeal against quantum, can it be said that in not reducing the penalty to a greater extent than it did it failed to exercise its discretion judicially?

In mitigation Mr. Bechgaard argues:

- (a) that there was no fraud;
- (b) that there was no loss of revenue;
- (c) that the income of the trust would be shown in the beneficiaries' personal returns;
- (d) that the total penalty is very large, and amounts to over Shs. 27,000/-;
- (e) that the trustees were ignorant of their duty;
- (f) that after being approached by the Income Tax Department, the delays which followed were excusable.

On behalf of the Commissioner it is pointed out that by virtue of s. 78 (5):

“the onus of proving that the assessment complained of is excessive shall be on the person assessed”.

The Commissioner may reduce the penalty but he would clearly require good reason to do so, and the reason for default would normally be solely within the knowledge of the person taxed. In complaining of the wrong exercise by the Commissioner of his discretion, the defaulter would therefore have to satisfy the court that the Commissioner was or had been made aware of the surrounding circumstances. To this extent there was an onus on the appellants on appeal.

(a) above is not in dispute, but the law provides a penalty of treble tax in circumstances where there is no fraud.

With regard to (b), I do not think it is said on behalf of the Commissioner that in fact any loss of revenue resulted. It must be borne in mind, however, that the penalty arises at the time of default, and is not dependent on subsequent events.

As to (c), only one witness gave evidence on behalf of the appellants and he himself was a trustee and beneficiary—Abdul Ghafur Sheikh. From his evidence it seems doubtful if in fact the beneficiaries did receive their shares of the income of the trust and if therefore their income tax returns showed this; he said he himself had received no money nor had he paid any to the other beneficiaries. No evidence was called on behalf of the Commissioner and he did not himself give evidence.

As to (d), the total penalty is of course a large sum, but it represented penalty on eight different annual assessments.

As to (e), ignorance of the law, if such it was, is of course no excuse. The learned judge did not, however, believe that the appellants were ignorant, but that they were guilty of wilful default or gross neglect. I cannot say that in the circumstances he was wrong in the view he took.

As to (f), the full rate of penalty is, as I have said, incurred at the time of the default, and it seems to me that the Commissioner is fully entitled to decide as soon as he becomes aware of the circumstances whether they are such as to justify his reducing the rate or not. The actual sum payable could not of

course be ascertained until the basic assessment had been made. He is not, as I see it, under any obligation to wait and see how the defaulters react after the default has been brought to their notice or, if he does, to be influenced thereby.

In my opinion these were bad cases of default. Until 1953 no return had been submitted since the formation of the trust in 1942, and the appellants may perhaps think themselves fortunate in being able to escape liability in respect of the years up to 1946 inclusive, as proceedings had become time-barred. Even in respect of the years coming within Group B, returns were not submitted by the trustees until they were issued with notices of assessment in 1955. As early as July 18, 1952, the Commissioner had warned the trustees that they had incurred liability to additional tax. On July 30, 1952, the Commissioner informed the trustees by letter that accounts "prepared by a qualified accountant" were required. Abdul Ghafur in evidence said that the reason the returns were not made until February, 1953, although the forms had been received in April, 1952, was "because the settlor trustee was out of the country". During this period the matter was apparently being dealt with by Abdul Ghafur's brother, Bashir, however, and Bashir made no such excuse in his correspondence with the Commissioner; it is clear that he was reluctant to make any return at all.

Even if this court has the power to reduce a penalty, I would not, in the circumstances, interfere with the manner in which the learned judge exercised his discretion. Before Mr. Bechgaard called his witness in the Supreme Court, counsel for the Commissioner informed the court that he would be prepared to accept a reduced penalty of 130 per cent., so that the decision of the court on this point had no practical effect whether it had or had not jurisdiction.

I now come to ground two of the appeal which reads:

- "2. That in relation to the appeals against Notices of Assessments for the Years of Income 1951 to 1953 inclusive, the learned judge erred in not allowing a deduction in respect of industrial building allowance on the basis of the estimated capital value of the building in question."

I cannot see that this was made a ground of appeal in the memorandum before the lower court. It was, however, mentioned by Mr. Bechgaard in his opening address and thereafter it was treated as a matter for decision. The building was a stone one with a corrugated iron roof and was partitioned and sub-let to a number of different tenants for commercial purposes. It is not known when it was erected, and in 1952 it was demolished. Abdul Ghafur said he could not estimate its age, but that twenty to thirty years earlier it would, be thought, have cost at least £7,000 to construct, making allowance for subsequent additions to it. Later in his evidence, following an adjournment, he said he had found plans showing the layout of the premises, which were dated 1942 and which seemed to show that the building was constructed in that year. Mr. Bechgaard says it must have been rebuilt, as there had previously been tenants. For the purpose of income tax allowance Abdul Ghafur placed a value of £5,000 on it. No claim for allowance was of course made prior to 1952 as income tax returns had not been made. The Second Schedule to the 1952 Act provides in para. 1 (1) that in respect of an industrial building an initial allowance against cost is made of 10 per cent. and in para. 2(1) that thereafter the allowance shall be 2 per cent. per annum until the cost has been written off. The learned judge said:

"There was, however, no evidence at all as to the actual cost of the building, although there was a scintilla of evidence from which it might have been possible to arrive at a vague estimate of its probable cost upon the assumption, of which there was no evidence, that it had been constructed round about the time when certain plans for its construction were prepared. Likewise there was no evidence as to who it was that incurred the expenditure upon constructing the building or as to the interest in the building which was held by whoever it was who incurred the expenditure, or that that interest has devolved for valuable consideration upon the appellants. It seems to me, therefore, quite clear that this deduction is not a permissible deduction."

There is no evidence how the settlor acquired the building—whether he constructed it and if so how much it cost him or whether he purchased it, and if so for how much, or whether he obtained it in some other way. Mr. Bechgaard submits that the trustees succeeded to it within the meaning of para. 41 of the Schedule on the basis that an industrial building is itself a trade or business. I am not sure whether Mr. Livingstone, who appeared for the Commissioner, agreed that the trustees obtained by succession, but he contends that at least it was necessary for the trustees to prove the capital expenditure, and referred this court to para. 1 and para. 2 of the Schedule. Mr. Bechgaard points out that as the building was disposed of and demolished before these proceedings originated, it was impossible to obtain a valuation. Perhaps it would not be unfair to say that the trustees should have considered the question of valuation for the purposes of income tax whilst the building was still standing. Mr. Bechgaard submits that the physical nature of a building cannot be ignored, and that the Commissioner must allow some value to be given to it. The physical nature has not of course been available for the Commissioner to see; there is only the evidence of Abdul Ghafur that in his opinion £5,000 was a reasonable valuation. He said that in 1951 total rent was Shs. 26,150/- of which Shs. 12,000/- related to another property; by this he may have meant that approximately Shs. 14,000/- (or £700) had been received from rents of the building in question. If this was so, it would represent approximately seven years' purchase value on a valuation of £5,000. One would perhaps think this represented a by no means unreasonable valuation. It seems, however, that the land without the building was afterwards sold for £23,000, so the rent of the building would presumably include a large site value; in other words, a high rent might be obtained more for the site than the building. There is no evidence what rent was obtained in 1952 or 1953.

There is so much that is uncertain—the age of the building, its constructional cost or purchase price, its eventual value—that it would, in my opinion, be too speculative for the court to find a valuation figure for it. Apart from saying “I am conversant with building costs”, there is no evidence that Abdul Ghafur had expert knowledge, and there is no independent valuation. He admittedly says that the Municipality valued it at £9,000, but he does not say when this was nor whether it included the plot on which the building stood. The point has not been taken by the Commissioner that as the building was demolished in 1952 no claim would anyway arise in respect of the year 1953, and possibly the law would permit a claim in such circumstances.

The third ground of appeal reads:

- “3. That in relation to both groups of appeals the learned judge erred when he stated that ‘all the appeals would be dismissed with costs’, because in relation to the eight consolidated appeals before the Supreme Court:
 - (a) the overall result was a reduction from assessments totalling Shs. 118,024/- to revised assessments totalling Shs. 43,852/-;
 - (b) each and every appeal resulted in a substantially reduced assessment;
 - (c) the Order as to costs was made accordingly under a misapprehension as to facts.”

As regards the appeals in Group A, the appellants were unsuccessful in their request that the assessment should be varied so as to exclude any additional tax, but they were successful to the extent that the penalty was reduced from 300 per cent. to 130 per cent. It is clear, however, as shown by this appeal and by the fact that they did not accept the offer of the Commissioner at the commencement of the hearing of the appeal in the court below, that they were not prepared to agree to the 130 per cent., and so the Commissioner had no alternative but to contest the appeal. In my opinion the Commissioner was entitled to his costs of the appeals in Group A.

The same considerations apply to Group B so far as the reduction to 130 per cent. is concerned. It is contended, however, that the learned judge did not take notice of the fact that in these three appeals the basic assessments were also very considerably reduced. The circumstances were that certified accounts in respect of the years of income 1951 to 1953 inclusive were not submitted to the Commissioner until September 30, 1958, by which time the appeals had already been filed on January 22, 1957. In the meanwhile the Commissioner had, on January 31, 1955, issued notices of assessment, the appellants up to then having failed to render returns. The accounts filed after the appeals were lodged were in the main accepted by the Commissioner and the appellants succeeded on only one of the points which remained in controversy and were dealt with in the judgment of the learned judge.

Under s. 78 (9) the costs of appeal are in the discretion of the judge and in the circumstances he was, in my opinion, fully entitled to exercise it as he did.

I would dismiss the appeal in toto with costs to the Commissioner.

Gould JA: I have had the advantage of reading in draft the judgment of Crawshaw, J.A., and I agree with his conclusion that the appeal should be dismissed with costs.

There is no need for me to recapitulate any of the facts and circumstances, which are fully dealt with in the judgment of the learned Justice of Appeal. Upon the question of the extent to which an appeal lies against the imposition of additional tax under s. 40 of the East African Income Tax (Management) Act, 1952, it appears to have been accepted by this court in *Mandavia v. Commissioner of Income Tax* (2), that an appeal did lie and to have been assumed without argument that the appeal extended to a review of the discretion of the Commissioner under s. 40(2) of the Act. The extent of the appeal must be ascertained from the Act itself and I doubt whether the cases of the *Lord Advocate v. McLaren* (4) or *Inland Revenue Commissioners v. Hinchy* (5) and (6), which were examined by the learned Justice of Appeal, are strictly germane to this question, except to the extent that the first mentioned case negatived any general power in a court to modify the penalty imposed by the particular section under consideration.

The right of appeal to the Supreme Court conferred by s. 78 of the 1952 Act is a right to appeal “against the assessment” made upon the person aggrieved. There is no restriction or limitation as to what questions may be considered on appeal, though second appeals to this court are restricted by s. 78(9) to questions either of law or of mixed law and fact. Therefore, in my opinion, if the additional tax imposed by s. 40 is properly included in the assessment it falls also within the scope of the appeal. I see no reason to hold that the additional tax ought not to be included in the assessment and it was so included both in the present case and in *Mandavia v. Commissioner of Income Tax* (2). Though the amount in question is in essence a penalty it is not so designated in s. 40 which uses the expressions “shall be chargeable . . . with treble the amount of tax”, and “shall be required to pay such amount of tax in addition” to the tax on the taxpayer’s true income. It would seem therefore that the additional amount is to be regarded as tax and under s. 71 (1) the Commissioner is directed to “proceed to assess every person chargeable with tax”. There is no particular method prescribed for the collection of additional tax payable under s. 40 and it is presumably recoverable as “tax” under s. 86 by suit or distraint, but it is difficult to imagine that it would be justifiable to use that machinery unless the taxpayer had been first assessed with the additional tax.

The fact that an appeal lies against an assessment incorporating additional tax levied under s. 40 does not, of course, confer upon the Supreme Court an entirely unfettered jurisdiction. The judge is given wide powers by s. 78 (6) which reads:

- “(6) The judge may confirm, reduce, increase, or annul, the assessment or make such order thereon as to him may seem fit.”

For convenience I will set out here the relevant portions of s. 40, which are s. 40 (1) (a) and s. 40 (2):

40.(1) Any person who:

- (a) makes default in furnishing a return, or fails to give notice to the Commissioner as required by the provisions of s. 59, in respect of any years of income shall be chargeable for such year of income with treble the amount of tax for which he is liable for that year under the provisions of s. 36 to s. 39 inclusive; or
 - (b)
and shall be required to pay such amount of tax in addition to the tax properly chargeable in respect of his true total income.
- (2) If the Commissioner is satisfied that the default in rendering the return or any such omission was not due to any fraud, or gross or wilful neglect, he shall remit the whole of the said treble tax and in any other case may remit such part or all of the said treble tax as he may think fit.”

Wide though the powers given to the judge upon appeal from an assessment may be, he is nevertheless an appellate tribunal, and it would be incumbent upon him to confirm the assessment unless the appellant shows that it is excessive (s. 78 (5)) an onus which he can only discharge by showing that the Commissioner was in error on a matter of law or fact or in some other way did not correctly base the assessment upon the provisions of the Act. Certain questions arising out of s. 40 could undoubtedly be attacked on appeal e.g. whether the appellant had in fact or law defaulted in furnishing a return or giving notice. If, of course, the appeal against some basic part of the assessment succeeded, the reduction would automatically be followed by a reduction in the treble tax. Again, if the Commissioner had purported to levy more than the treble tax it would be subject to challenge. Questions which might arise under s. 40 (2) are more complex and if this sub-section stood alone and had no bearing upon the content of the assessment such cases as the *Lord Advocate v. McLaren* (4), and *Inland Revenue Commissioners v. Hinchy* (5) and (6), would be in point. But the sub-section is relevant to the quantum of the assessment and therefore, in my opinion, it is open to the judge on appeal to ascertain whether its provisions have been fully and correctly complied with.

Under the relevant portions of s. 40 the Commissioner is under a duty, first, to decide whether or not default or omission has been made; I have already expressed the opinion that his decision on that question is open to review upon appeal. Then, having decided that default or omission has taken place, the Commissioner, under sub-s. 2, must apply his mind to the question whether the default or omission was due to any fraud, or gross or wilful neglect, and if he finds himself satisfied that the default was to none of these, there is a mandatory duty to remit the whole of the treble tax. Mr. Bechgaard, counsel for the appellant, conceded in this court that it was not open to him to contend that there was no evidence to support a finding of wilful neglect. Having decided that it is not a case for total remission, the Commissioner has a discretion—he “may remit such part or all of the treble tax as he may think fit”. These are the important words in the present case, for it is contended that the Commissioner ought to have made a remission and that it should have been greater than the reduction to 130 per cent. agreed to on the Commissioner’s behalf at the hearing of the appeal.

The words last quoted confer upon the Commissioner a discretion but it is one the exercise of which is reflected in the assessment and is therefore, in my opinion, subject to appeal. There is strong authority that where an administrative discretion is subject to an unlimited right of appeal (and by that I think is meant an appeal not restricted to law or fact or in any other way) the appellate court can consider the matter de novo and substitute its own opinion. This appears to be established by such cases as *Fulham Borough Council v. Santilli* (7), [1933] 2 K.B.357, *Croydon Corporation v. Thomas* (8), [1947] 1 K.B. 386 and *Stepney Borough Council v. Joffe and Others* (9), [1949] 1 All E.R. 256. These cases are distinguishable from decisions such as that in *Liversidge v. Anderson* (10), [1941] 3 All E.R. 338 in that in that case no right of appeal had been given from the ministerial decision. I do not deem it necessary to go deeply into the cases which I have mentioned but will quote two passages, both from judgments of Lord Goddard, C.J. (as he then was). The first is at p. 388 of the report of *Croydon Corporation v. Thomas* (8):

“The words which we have to construe are to be found in sub-s. 1 of s. 75 of the Public Health Act, 1936, and are as follows: ‘Any person aggrieved by a requirement of the local authority under this sub-section may appeal to a court of summary jurisdiction’. If you take the first part of sub-s. 1 alone, it appears to put the widest possible discretion into the hands of the local authority. It appears to enable them, by administrative act, to require either the owner or the occupier to provide this dustbin. Accordingly, if the section remained without the addition of the words I have just read, it would seem reasonably clear that that was an administrative discretion given to an elected body, such as the corporation, with which no one could interfere. It is not a discretion, on the face of it, which requires to be exercised judicially; it is an administrative discretion. But when you find that any person aggrieved by a requirement of the local authority may appeal to a court of summary jurisdiction, it is obvious that Parliament intends the discretion which has been exercised by the local authority to be subject to an appeal, and the final determination, in the event of an appeal, is left to the justices and not to the local authority.”

The second passage is at p. 258 of the report of *Stepney Borough Council v. Joffe* (9):

“It is argued that on an appeal against a refusal on the ground of misconduct or for any other sufficient reason rendering the applicant unsuitable to hold such a licence, the magistrate is not entitled to substitute his opinion for that of the borough council, but all he can decide is whether there was evidence on which the council could come to that conclusion. I find myself unable to accept that argument. If it be right, the right of appeal which is given, at any rate against a refusal on any ground mentioned in s. 21 (3) (a), would be purely illusory. It would, I suppose, as Humphreys, J., pointed out during the argument, really be an appeal on the question of law whether there was any evidence on which the borough council could form an opinion. If their decision is to be a mere matter of opinion and their opinion is to be conclusive, I do not know what evidence the council would be obliged to have. They could simply say: ‘In our opinion, this man or this woman is unsuitable for holding a licence’, and give any reason they liked. I do not know how a court could say on appeal whether that was a sufficient reason. If the reason is to be one which is sufficient in their opinion, it is difficult to see how any court of appeal could set aside their decision.

“On the other hand, there is given here an unrestricted right of appeal, and if there is an unrestricted right of appeal, it is for the court of appeal, in this

case the metropolitan magistrate, to substitute its opinion for the opinion of the borough council. That does not mean to say that the court of appeal ought not to pay great attention to the fact that the duly constituted and elected local authority have come to an opinion on the matter and ought not lightly to reverse their opinion. It is constantly said (although I am not sure that it is always sufficiently remembered) that the function of a court of appeal is to exercise its powers where it is satisfied that the judgment below is wrong, not merely because it is not satisfied that the judgment was right. In the present case the words are very wide. The magistrate is given power to 'confirm, reverse or vary the decision of the borough council', and it seems to me that once the applicant appeals to him, he is bound to form an opinion on the matter and 'confirm, reverse or vary the decision of the borough council' according to the judgment which he forms."

These authorities were applied by this court to the decision of a minister under the Wheat Industry Ordinance, 1952, in *Kenya Aluminium & Industrial Works Ltd. v. Minister for Agriculture, Animal Husbandry and Water Resources* (11), [1961] E.A. 248 (C.A.) and may well have been the basis of the attitude taken by this court in *Mandavia v. Commissioner of Income Tax* (2). There may be a distinction between the cases referred to and the present one in that the unlimited right of appeal in the former was given directly against the decision of the authority and in the present case it is against an assessment in which the exercise of the discretion in question is but one factor; I doubt if this is material.

For the reasons given, I incline to the view that the learned judge in the court below was entitled to regard himself as being, as it were, in the shoes of the Commissioner in this matter, subject to the qualification that before interfering with the discretion exercised he had to be satisfied (and the onus was on the appellant) that the decision of the Commissioner was wrong. However, as Crawshaw, J.A., pointed out in his judgment, this question was not fully argued before us, and upon the view I take of the matter it is not necessary to express a concluded opinion, particularly as, owing to changes in legislation introduced in 1958 the question is largely academic. The matter was argued before this court on the basis that the learned judge had the power to substitute his own opinion, and he appears to have considered that the offer made on behalf of the Commissioner represented what was reasonable. For the reasons given by the learned Justice of Appeal I find nothing in the case which would impel me to dissent from this assessment. If the powers of the learned judge on appeal should have been more narrowly regarded that could not assist the appellant. Even if the true position were that the treble tax was not in any way subject to review on appeal (and I do not think that is the case) the reduction from 300 per cent. to 130 per cent. could be supported, so far as jurisdiction is concerned, by the fact that the whole assessment was before the learned judge on appeal and the reduction was made with the consent of the Commissioner.

Upon grounds two and three of the memorandum of appeal I am in agreement with the views expressed by the learned Justice of Appeal and do not wish to add any observations of my own.

Sir Kenneth O'Connor P: I have had the advantage of reading in draft the judgments of Crawshaw, J.A., and Gould, J.A.

For the reasons given by Gould, J.A., I incline to the view that it is competent for the Supreme Court to review a decision relating to treble tax of the Commissioner of Income Tax if that court is satisfied that that decision was wrong. However, as that question was not fully argued before this court in this case, I express no concluded opinion on it.

I find nothing in this case which impels me to the conclusion that the reduction of the additional tax from treble tax to 130 per cent. was wrong or insufficient or which would warrant interference by this court.

On ground two of the memorandum of appeal I am in agreement with the views expressed by Crawshaw, J.A.

On ground 3, the order as to costs appears starting at first sight; but on further consideration, the grounds for it appear. They are set out in the judgment of Crawshaw, J.A. I see nothing which would justify this court in interfering with the discretion as to costs exercised by the learned judge in the Supreme Court.

The appeal will be dismissed.

The costs of the appeal must follow the event.

Appeal dismissed.

For the appellant:

K Bechgaard QC and AB Patel

For the respondent:

HB Livingstone (Assistant Legal Secretary, East African High Commission)

For the appellant:

Advocates: *AB Patel*, Nairobi

For the respondent:

The Legal Secretary, E.A. High Commission

Jafferli M Alibhai v The Commissioner of Income Tax

[1961] 1 EA 610 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	12 October 1961
Case Number:	4/1961
Before:	Sir Alastair Forbes V-P, Sir Trevor Gould JA and Madan J
Appeal from:	H.M. High Court of Uganda–Lewis, J

[1] *Income tax – Construction of statute – Ordinary meaning and grammatical construction – East African Income Tax (Management) Act, 1952, s. 22 (2) (a).*

[2] *Statute – Construction – Taxing Act – Ordinary meaning – Later Act as aid to construction of earlier Act – Ambiguity in earlier Act – Deemed distribution – “In the course of such period” – East African Income Tax (Management) Act, 1952, s. 22(2) (a) – Income Tax Act, 1952, s.245, s. 256 (5) – East African Income Tax (Management) Act, 1958, s. 37.*

Editor's Summary

The appellant was a shareholder in a company the financial year of which ended on December 31 annually. The company had been a private company but on June 23, 1956, the shares became freely transferable and shares representing not less than 25 per cent. of the voting power became beneficially owned by the public and were so held on December 31, 1956. The Commissioner of Income Tax made an order pursuant to s. 22 (1) of the East African Income Tax (Management) Act, 1952, which enables the Commissioner in certain circumstances to order that the undistributed portion of 60 per cent. of the total income of a company in respect of any period for which the accounts are made up "shall be deemed to have been distributed as dividends amongst the shareholders as at the end of the sixth month after the date to which such accounts have been made up" whereupon the proportionate share of such profits of each shareholder is required to be included in the total income of such shareholder. Pursuant to such order an assessment was made upon the appellant from which he appealed. The High Court dismissed the appeal and the appellant brought this further appeal, contending that the words "in the course of such period" in s. 22(2) of the Act means "at any time during such period". For the Commissioner it was submitted that "in the course of such period" means "throughout the whole of such period".

Held –

- (i) the grammatical construction and ordinary meaning of the words “in the course of such period” in s. 22 (2) of the Act are “at any time during such period”.
- (ii) on the basis that subsequent legislation on the same subject may be referred to as an aid to construction where an earlier Act is ambiguous, the terms of s. 37 of the East African Income Tax (Management) Act, 1958, supported the construction founded on grammatical grounds. Dictum of Lord Sterndale, M.R., in *Cape Brandy Syndicate v. Commissioner of Inland Revenue*, 12 T.C. 358 at p. 373 adopted.

Appeal allowed. Order that the assessment be set aside.

Cases referred to:

- (1) *Tatem Steam Navigation Co. Ltd. v. Inland Revenue Commissioners*, [1941] 2 All E.R. 111; [1941] 2 All E.R. 616.
- (2) *Cape Brandy Syndicate v. Commissioners of Inland Revenue*, 12 T.C. 358.
- (3) *Scott v. Russell (Inspector of Taxes)*, 30 T.C. 394.

October 12. The following judgments were read:

Judgement

Sir Alastair Forbes V-P: This is an appeal against a decision of the High Court of Uganda in so far as, by that decision, the appellant’s appeal to the High Court against an additional assessment to income tax in respect of the year of income 1957 was dismissed. Appeals by the appellant against two assessments, one in respect of the year of income 1956 and one in respect of the year of income 1957, were before the High Court, and were there consolidated. Both appeals were dismissed with costs, but the present appeal concerns only the assessment in respect of the year 1957.

The appeal relates to the construction to be put on certain words in sub-s. (2) of s. 22 of the East African Income Tax (Management) Act, 1952 (hereinafter referred to as “the Act”). Sub-section (1) of that section enables the respondent (hereinafter referred to as “the Commissioner”) in certain circumstances to order that the undistributed portion of 60 per cent. of the total income of a company in respect of any period for which the accounts of the company are made up

“shall be deemed to have been distributed as dividends amongst the shareholders as at the end of the sixth month after the date to which such accounts have been made up”;

and thereupon the proportionate share of such profits of each shareholder is required to be included in the total income of such shareholder for the purposes of the Act. Such an order was made by the Commissioner against the Jamal Ramji Coffee Curing Company Ltd. (hereinafter called “the company”), in which the appellant is a shareholder, in respect of its income for the year of income 1956, and, in pursuance of such order, the assessment under appeal was raised on the appellant in respect of the year of income 1957. The accounting periods of the company at the relevant time ended on December 31, in each year.

The opening words and para. (a) of sub-s. (2) of s. 22 of the Act read as follows:

“(2) This section shall not apply to any company in which the public are substantially interested or to a subsidiary company of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof; and for the purposes of this section—

- (a) a company shall be deemed to be a company in which the public are substantially interested if shares of the company (not being shares entitled to a fixed rate of dividend, whether with or without a further right to participate in profits) carrying not less than twenty-five per centum of the voting power have been allotted unconditionally to, or acquired unconditionally by, and are at the end of the relevant period beneficially held by, the public (not including a company to which the provisions of this section apply, or would apply if such company was resident in the Territories), and any such shares have in the course of such period been, in fact, freely transferable by the holders to other members of the public.”

Paragraph (b) of the sub-section defines the word “public” for the purposes of the sub-section, but nothing turns on this in the instant case, so the paragraph is not material.

The question what the words “the relevant period” in para. (a) mean was considered in the appeal to the High Court which related to the assessment on the appellant in respect of the year of income, 1956. It was held that “the relevant period” was the accounting period in respect of which an order was made on the company under sub-s. (1) of s. 22. This decision has not been challenged on this appeal and for the purposes of this appeal it follows that “the relevant period” is the year of income 1956.

The company was originally a private company, and carried on business as such for many years, but on June 23, 1956, it became a company “in which the public are substantially interested”. On that date the shares of the company became freely transferable and shares carrying not less than 25 per cent. of the voting power became beneficially held by the public, and were so held on December 31, 1956. The appellant contends that by reason of this the company in 1956 was not a company to which s. 22 of the Act applied, and that the order made by the Commissioner in respect of its undistributed income for that year was incompetent. The Commissioner contends that, to fall within the exemption in sub-s. (2) it must be shown that shares in the company were freely transferable by the holders to other members of the public during the whole of the year 1956, and not merely during a part of the year. The learned trial judge upheld the Commissioner’s contention.

The short point we have to consider is whether the words “in the course of such period” in the passage:

“and any such shares have in the course of such period been, in fact, freely transferable by the holders to other members of the public”

are to be construed as meaning “throughout the whole of such period”, or “at any time during such period”.

As a pure matter of grammatical construction, I would have said that the ordinary meaning to be attached to the words “in the course of such period” is “at any time during such period”. Mr. Summerfield, for the Commissioner, conceded that the words could bear this meaning if taken out of their context, but contended that regard must be had to the evil aimed at by the section, that so to construe the words would make nonsense of the section, and that therefore in the context of the section the words must mean “throughout the whole period”. This was the view accepted by the learned judge. In my view the construction contended for by Mr. Summerfield, while it is a possible one, is the more strained of the two, and I am of opinion that strong grounds must be shown to induce the court to accept it, particularly bearing in mind the fact that the Act is a taxing enactment.

The evil aimed at in s. 22 is clearly the evasion of tax by individuals through the medium of private companies and the device of transferring the profits of such companies to capital instead of distributing them.

The learned judge appears to have been impressed by the extreme example cited to him, as it was to us, of the absurdity which would result on the interpretation “at any time during” where a private company continued a private company for 364 days of the year, but became a public company for the 365th day, and so escaped the application of the section. There is some force in this, but the converse appears to me equally absurd, that, on the interpretation “throughout the whole of such period” a company which was a public company for 364 days of the year would still be regarded as a private company for the purposes of the section. Since the extreme examples on either side result in absurdity, I do not think weight is to be attached to one or other in the interpretation of the section.

Mr. Summerfield argued that the interpretation “at any time during” would facilitate tax evasion by the very method the section was designed to prevent, in that a company could switch from being a private company to a public company, and back again, in successive accounting periods. But this argument appears to ignore the fact that at least 25 per cent. of the shares in the company would be held by the public when the company became a public company. It can hardly be assumed that members of the public could be repeatedly persuaded to part with their shares to the original members of the private company to enable the company to revert to its private status. I do not attach much weight to this argument.

We were referred to the *Tatem Steam Navigation Co. Ltd. v. Inland Revenue Commissioners* (1), [1941] 2 All E.R. 111, as was the learned judge. I agree with the learned judge, however, that that case does not assist. The section (now sub-s. (5) of s. 256 of the United Kingdom Income Tax Act, 1952) which was considered in the *Tatem* case (1), corresponds to sub-s. (2) of the Act, and contains the same phrase, but the meaning of that phrase was not in issue in the case.

Nevertheless, I think some assistance is to be derived from sub-s. (5) of s. 256 of the United Kingdom Act. Section 256 defines the companies to which s. 245 of that Act applies, and s. 245 is, for practical purposes so far as this case is concerned, in pari materia with sub-s. (1) of s. 22 of the Act. The evil at which the sections are directed is clearly the same, though in the guise of evasion of surtax in the United Kingdom. Sub-section (5) of s. 256 of the United Kingdom Act is, similarly, in pari materia with sub-s. (2) of s. 22 of the Act, though not identical. The passage in sub-s. (5) of s. 256 corresponding to the one now under consideration, is:

“and any such shares have in the course of such year or other period been the subject of dealings on a stock exchange in the United Kingdom.”

There are, of course, obvious local reasons for the adoption in the Act of the test “freely transferable” in place of being the subject of dealings on a stock exchange. The principle, however, is the same in each section, and it is to be noted that, since a “dealing” is a finite act, the words “in the course of such year” in the United Kingdom section can only mean “at any time during such year”. It was argued that since the test in sub-s. (2) of s. 22 is a state, as opposed to an act in the United Kingdom section, a different meaning is to be given to the words “in the course of”. But the point is that the evil aimed at by the United Kingdom provisions is substantially the same as that aimed at by the East African provisions, and is apparently sufficiently safeguarded in the United Kingdom by the test of dealings having taken place at any time during the relevant period. Is there therefore any compelling reason to think that a construction which, in effect, achieves the same result in the East African provision is to be rejected in favour of the stricter construction for which the Commissioner contends? I can see none.

Mr. Bechgaard, for the company, invited our attention to s. 37 of the East African Income Tax (Management) Act, 1958, which repealed and replaced the Act. That such a reference to a later Act for the purpose of clarifying a provision of an earlier Act is permissible appears from *Cape Brandy Syndicate v. Commissioners of Inland Revenue* (2), 12 T.C. 358 where, at p. 373, Lord Sterndale, M.R., said:

“I think it is clearly established in a case to which we were referred, the *Attorney-General v. Clarkson*, [1900] 1 Q.B. 156, that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous.”

The provisions of sub-s. (3) of s. 37 of the 1958 Act, which correspond to sub-s. (2) of the s. 22 of the Act, have been re-drafted and amplified, but still provide, *inter alia*, the same test, namely:

“if, in the course of such period, any such shares of such company:

- (i) have been freely transferable;”

Sub-section (2) of s. 37 of the 1958 Act provides:

- “(2) For the purposes of this section, in relation to any accounting period a company shall be deemed to be a subsidiary company if, by reason of the beneficial ownership of shares therein, the control of the company is, during the whole of a period of twelve months after the end of such accounting period, in the hands of another company, not being a controlled company, or of two or more other companies none of which is a controlled company.”

Mr. Bechgaard argues that in s. 37, where the draftsman intended to indicate the continuance of a state of things during the whole of a period, he said so in clear terms; and that it follows that where he used the words “in the course of” a period, he must be taken to have meant something different from “during the whole” of such period.

I think there is force in this argument, and it fortifies me in the view I have taken on grammatical grounds for the construction to be put on the words “in the course of such period” in sub-s. (2) of s. 22 of the Act. Nothing in the arguments advanced by Mr. Summerfield has convinced me that the alternative construction, which I regard as the more strained one, ought to be put on the phrase.

Considerable argument was addressed to us on the question whether s. 22 of the Act was a penal section or not. I do not think it necessary to refer to this aspect of the matter or decide the question. It is sufficient for the purposes of this case to have regard to the maxim of income tax law stated by Lord Simonds in *Scott v. Russell (Inspector of Taxes)* (3), 30 T.C. 394 at p. 424:

“that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him.”

Mr. Summerfield argued that the tax was clearly imposed by sub-s. (1) of s. 22, and that sub-s. (2) merely created an exception to the general rule in sub-s. (1), and so did not fall within that principle. Where the question is whether the power vested in the Commissioner is exercisable in respect of a particular company, and ambiguity exists, I do not see why the principle should not apply.

For the reason I have given I think the appeal should be allowed with costs. I would set aside the judgment and “order”—I think it should properly be a “decree”—of the High Court in so far as it relates to the assessment under appeal and substitute an order that such assessment be set aside. I would also

set aside the order for costs in the High Court and substitute an order that each party pay its own costs.

Sir Trevor Gould JA: I have read in draft the judgment of the learned Vice-President; I agree with his reasoning and conclusions and with the orders proposed by him.

Madan j: I also agree.

Appeal allowed. Order that the assessment be set aside.

For the appellant:

K Bechgaard QC and AB Patel

For the respondent:

JC Summerfield (Deputy Legal Secretary, East African High Commission)

For the appellant:

Advocates: *Hunter & Greig*, Kampala

For the respondent:

The Legal Secretary, E.A. High Commission

Damodar Jamnadas and others v Noor Mohamed Valji [1961] 1 EA 615 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	13 October 1961
Case Number:	16/1961
Before:	Sir Kenneth O'Connor P, Crawshaw and Newbold JJA
Appeal from:	H.M. Supreme Court of Kenya–Boyle, Ag. J

[1] *Money-lender – Guarantee – Memorandum signed by borrower – Copy memorandum not supplied to guarantor – Whether guarantor must receive such copy – Whether guarantor a “borrower” within s. 11, Money-lenders’ Ordinance (Cap. 307) (K.) – Civil Procedure (Revised) Rules, 1948, O. V, r. 8 (K.).*

[2] *Evidence – Money-lender – Memorandum in writing – Burden of proving compliance with s. 11 Money-lenders’ Ordinance (Cap. 307) (K.) – Whether burden can be discharged by oral evidence – Indian Evidence Act, 1872, s. 91, s. 101, s. 102 and s. 103.*

Editor’s Summary

The respondent and three others were sued in the Supreme Court by the appellants for moneys due on

certain promissory notes. Judgment in default of appearance was entered against two of the defendants; in accordance with an endorsement on the plaint the third defendant was not served and the case proceeded against the respondent only. The appellants were licensed money-lenders and had made loans to one, Jamal, who gave as security promissory notes for Shs. 45,000/- made in favour of Jamal by persons who were not parties to the suit and endorsed by Jamal to the appellants. On March 1, 1958, the promissory notes were returned to the makers thereof and instead the appellants took as security two promissory notes, one for Shs. 15,000/- and the other for Shs. 30,000/-, both made by Jamal in favour of one, Akbarali, who endorsed them to the appellants. The promissory note for Shs. 15,000/- was guaranteed by one, Rayani, and the promissory note for Shs. 30,000/- was guaranteed by the respondent. On August 18, 1958, both guarantees were cancelled and in substitution a joint guarantee in writing for the sum of Shs. 36,500/- was signed by Rayani and the respondent. In the proceedings before the Supreme Court no note or memorandum as required by s. 11 of the Money-lenders' Ordinance was produced but there was oral evidence that the requisite note or memorandum had been given to Jamal and Akbarali.

The trial judge found *inter alia* that the appellants' claim was for repayment of the balance of the money lent to Jamal; that the money lent to Jamal was secured, *inter alia* by the guarantee of the respondent; that the transactions of March 1, and August 18, 1958, were renewals of the original loans made to Jamal; and that no note or memorandum conforming to s. 11 of the Ordinance had been given to the respondent in respect of the transaction on August 18, 1958. The judge dismissed the suit holding that a guarantor was a borrower within s. 11 of the Ordinance and that as no note or memorandum had been given to the respondent the guarantee was unenforceable against the respondent. On appeal the issues were *inter alia* whether a guarantor is a borrower within s. 11 of the Ordinance; whether the burden of proving compliance with s. 11 lies on the money-lender and whether such burden can be discharged by oral evidence.

Held –

- (i) a guarantor is not a borrower within the meaning of s. 11 of the Money-lenders' Ordinance; accordingly there was no necessity for a note or memorandum in writing to be signed by the respondent nor for a copy of it to be delivered to him.
- (ii) section 11 *ibid* places on the money-lender the onus of proof that a note or memorandum in writing and containing the requisite particulars was signed by and delivered to the borrower before the money-lender can enforce the contract for repayment or any security given by the borrower; proof of these facts is a condition precedent to the enforcement of the contract or security, and if the requisite proof is not given then the money-lender cannot succeed.
- (iii) the onus on the money-lender to prove that a note or memorandum in writing conforming to s. 11 of the Ordinance was made and signed can be discharged only by production of the note or memorandum itself and, save in a case where secondary evidence is admissible, oral evidence of such note or memorandum is inadmissible.
- (iv) since no note or memorandum in relation to either to the original loans, or to the transaction of March 1, 1958, or to any subsequent transaction, had been produced the appellants had failed to discharge the onus on them, and accordingly they could not succeed against the respondent.

Appeal dismissed.

Cases referred to:

- (1) *U. L. Patel v. Fashion Stores and Another*, Kenya Supreme Court (Kisumu) Civil Case No. 191 of 1958 (unreported).
- (2) *Eldridge and Morris v. Taylor and Another*, [1931] All E.R. Rep. 542.
- (3) *Temperance Loan Fund Ltd. v. Ross and Another*, [1932] All E.R. Rep. 690.
- (4) *Subramonian v. Lutchman* (1922), 50 I.A. 77.
- (5) *Central Advance and Discount Corporation Ltd. v. Marshall*, [1939] 3 All E.R. 695.

October 13. The following judgments were read:

Judgment

Newbold JA: This is an appeal against a judgment and decree of the Supreme Court of Kenya sitting at Kisumu dated December 13, 1960, whereby it was ordered that the suit of the plaintiffs (now the appellants) against the fourth defendant on the record (now the respondent) be dismissed with costs. The suit as filed in the Supreme Court was against four defendants. Judgment in default of appearance was entered against the first two defendants; it was endorsed on the plaint that the third defendant was not to be served and in fact he was not served and took no part in the proceedings; and the suit proceeded only against the fourth defendant and this appeal is concerned only

with the case against him. I consider it most unsatisfactory that a defendant should be joined on the record with an endorsement that he is not to be served. Order V, r. 8 of the Civil Procedure (Revised) Rules, 1948, requires that service be made on each defendant and as this was neither done nor intended to be done the learned judge should have struck from the record the name of the third defendant. As was stated by the learned President during the hearing of the appeal, the naming of a defendant on the plaint with an endorsement that he is not to be served is a bad practice and should not be followed.

The essential facts, so far as they are relevant to this appeal, are as follows. The appellants are licensed money-lenders and their sole business was money-lending. Towards the end of 1957 and the beginning of 1958 the appellants lent unspecified sums of money to one Jamal Alibhai Velji (the first defendant before the Supreme Court and hereinafter referred to as "Jamal") who gave as security therefore certain promissory notes totalling Shs. 45,000/- drawn by persons who were not parties to the suit in favour of Jamal and endorsed by him to the appellants. The finding of the learned judge on the issue whether the provisions of s. 11 of the Money-lenders' Ordinance (Cap. 307 of the Laws of Kenya) (hereinafter referred to as "the Ordinance") had been complied with in relation to the loans was that no evidence had been led to the contrary. What is clear is that the note or memorandum in writing required by the section was not produced. On March 1, 1958, a transaction took place whereby the promissory notes which had been given as security for the loans were returned to the parties who had drawn them and instead the appellants took as security two promissory notes drawn by Jamal, one for Shs. 15,000/- and the other for Shs. 30,000/-, in favour of Akberali Jamal Alibhai (the second defendant before the Supreme Court and hereinafter referred to as "Akberali") and endorsed by Akberali in favour of the appellants. The promissory note for Shs. 15,000/- was guaranteed by Gulamhussein Alibhai Rayani (who was the third defendant on the Supreme Court record and is hereinafter referred to as "Rayani") and the promissory note for Shs. 30,000/- was guaranteed by the respondent. Whether this transaction resulted in the discharge of Jamal and a notional loan to Akberali, who would thus become the debtor, or was a renewal of the original loans to Jamal, who thus remained the debtor, is in dispute. The learned judge found as a fact that the transaction was a renewal of the original loans to Jamal. No finding of fact was made by the learned judge whether the provisions of s. 11 of the Ordinance had been complied with in respect of either Jamal or Akberali though he found that such provisions had not been complied with in respect of the respondent. What is clear is that no note or memorandum in writing as required by the section was produced. On August 18, 1958, another transaction took place whereby the guarantee of Rayani for the promissory note of Shs. 15,000/- and the guarantee of the respondent for the promissory note of Shs. 30,000/- were cancelled and in substitution therefor a joint guarantee in writing for the sum of Shs. 36,500/- (being the amount then outstanding and owed to the appellants as a result of the previous transactions) was signed by Rayani and the respondent. This written guarantee set out, *inter alia*, the monthly instalments whereby the sum of Shs. 36,500/- was to be repaid and that the amount was owing by Jamal and that it was the due payment by him of the debt which was guaranteed. What part either Jamal or Akberali played in this transaction is not clear. It is clear that no note or memorandum within the meaning of s. 11 of the Ordinance and signed by either Jamal or Akberali was produced. In relation to this guarantee of August 18, 1958, a subsequent transaction took place which, for the purposes of this appeal, is irrelevant.

Default in the repayment of the money lent having taken place, the appellants brought suit against the four defendants. For the reasons stated earlier, the proceedings in the Supreme Court before the learned judge related only to the

plaintiffs and the respondent, who had, in his pleading, raised the issue of unenforceability by reason of non-compliance with s. 11 of the Ordinance. At the hearing certain issues were agreed and the answers of the learned judge to those issues are set out in his judgment. In effect, so far as is relevant to the issues on this appeal, the learned judge found that the suit was for the repayment of the balance of money lent to Jamal; that the money lent to Jamal was secured, *inter alia*, by the guarantee of the respondent; that the transactions of March 1, 1958, and August 18, 1958, were renewals of the original loans made to Jamal; and that no note or memorandum conforming to the provisions of s. 11 of the Ordinance had been given to the respondent in respect of the transaction of August 18, 1958. The learned judge held as a matter of law that a guarantor was a borrower within the meaning of s. 11 of the Ordinance and that as no note or memorandum conforming to the provisions of the section had been given to the respondent the guarantee was unenforceable against the respondent.

The issues raised on this appeal are as follows:

1. Is a guarantor a borrower within the meaning of s. 11 of the Ordinance, with the result that the provisions of that section must be complied with in respect of him?
2. Did the transaction of March 1, 1958, result in a new loan being granted to Akberali, who thus became the debtor, the old loans to Jamal being discharged or was it merely a renewal of the loans to Jamal, who thus remained the debtor?
3. Where a money-lender is suing either the debtor or the surety for the repayment of money lent is the onus on the money-lender to prove that the provisions of s. 11 of the Ordinance have been complied with before he can enforce the contract for repayment or the security?
4. If the onus is on the money-lender, can it be discharged by oral evidence that the requisite note or memorandum in writing was signed by the borrower and that the copy thereof was duly delivered to him or must the document itself be produced?

As regards the first issue, the learned judge gave no reasons for holding that a guarantor was a borrower within the meaning of s. 11 of the Ordinance. It appears, however, that in the course of the case he was referred to a decision of Wicks, J., given on March 2, 1958, in *U. L. Patel v. Fashion Stores and Another* (1), Kenya Supreme Court (Kisumu) Civil Case No. 191 of 1958 (unreported). We have been provided with a copy of the judgment of Wicks, J., and from the judgment it appears that the facts in that case were that the provisions of s. 11 of the Ordinance had been complied with in respect of the borrower but that the requisite note or memorandum had not been signed by the guarantor nor had a copy of it been delivered to him. Wicks, J., referred to certain dicta of Scrutton, L.J., in *Eldridge and Morris v. Taylor and Another* (2), [1931] 3 All E.R. Rep. 542 at p. 544; to the provisions of s. 11 of the Ordinance; to the fact that the guarantee is a security within the meaning of that section; to the relationship which exists between the guarantor and the lender and borrower; and to the vital interest of the guarantor in the terms of the contract between the lender and borrower. He stated that the guarantor considers himself the borrower and the lender often considered the guarantor the borrower, and in the result he held that a guarantor was a borrower within the meaning of s. 11 of the Ordinance. As was pointed out by Mr. Nazareth, who appeared for the appellant, the dicta of Scrutton, L.J., in the *Eldridge* case (2), would not appear to be related to whether a guarantor is a borrower but whether the wife was a borrower; and on the facts of that case the wife, who was a guarantor, might also have been a borrower quite independently

of the fact that she was a guarantor. With great respect to Wicks, J., and to the learned judge from whom this appeal is brought, I cannot see why a guarantor should be said to be a borrower within the meaning of the section. It is true that a guarantor is vitally interested in the terms of the contract; it is also true that he is in an intimate relationship with the lender and the borrower; but neither interest nor relationship can transform one party, who is a guarantor, into another party, who is a borrower. To do so would disregard one (but not the only) essential difference between a contract to repay money and a contract to guarantee the repayment of money by another. In the first case an immediate and primary liability to repay exists; in the other only a contingent and secondary liability to pay arises. This difference can be seen immediately on examining a contract of guarantee. Mr. Nazareth also pointed out further difficulties which would arise if a guarantor were to be regarded as a borrower within the meaning of the section—for example where the guarantee related to part only of the debt or was contingent upon terms different from those agreed with the borrower: in any such case are there to be separate and different memoranda? Reference was made in the course of argument before the learned judge to the decision in *Temperance Loan Fund Ltd. v. Ross and Another* (3), [1932] All E.R. Rep. 690, as supporting the judgment of Wicks, J. One of the points decided in that case was that a security “given by the borrower” may take the form of a guarantee given by a third party, but this is a very different thing from holding that the guarantor, who is the third party, thereby becomes the borrower. In my view, with respect, the learned judge was incorrect in holding that a guarantor was a borrower within the meaning of s. 11 of the Ordinance and the decision of Wicks, J., in the case referred to should not be followed. It follows from this that there was no necessity for a note or memorandum in conformity with the section to be signed by the respondent nor for a copy of it to be delivered to him.

As regards the second issue, there was cogent evidence that a new loan had been granted to Akberali and the loan to Jamal paid off in the statement of the fourth appellant (a partner in the appellants’ firm) that when Akberali signed the document, Jamal’s account had been credited and Akberali’s debited. There was also cogent evidence to the contrary in the statement that the suit was for the balance of cash lent to Jamal and in the statements in the exhibits. The learned judge, having heard the witness for the appellants, found as a fact that the transaction of March 1, 1958, was a renewal of the original loans to Jamal and I do not see any sufficient reason to upset this finding especially as I find difficulty in construing any averment of a discharge of the loan to Jamal and a new loan to Akberali out of the pleadings. In any event, having regard to my views on the third and fourth issues on this appeal, it is immaterial whether the transaction was the renewal of the old loans to Jamal or a new loan to Akberali.

As regards the third issue, s. 11 of the Ordinance is as follows:

- “11. (1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a money-lender after the commencement of this Ordinance or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given, as the case may be.

- “(2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan expressed in terms of a rate per centum per annum, or the rate per centum per annum represented by the interest charged as calculated in accordance with the provisions of the Schedule to this Ordinance.”

In my view, this section clearly places the onus on the money-lender to prove that a note or memorandum in writing and containing the requisite particulars was signed by the borrower and that a copy thereof was duly sent or delivered to the borrower before he can enforce the contract for repayment or any security given by the borrower. The proof of these facts is a condition precedent to the enforcement of the contract or security, and if the requisite proof is not given, then he cannot succeed. Where the money-lender has given the requisite proof of these facts but the borrower or the surety seeks to deny the enforceability of the contract or security on the allegation that the note or memorandum was not signed before the money was lent or the security given, then the onus is on the borrower or surety to prove the allegation. Mr. Nazareth submitted that as the respondent had raised in his defence the averment of non-compliance with the provisions of s. 11 of the Ordinance, the onus was on him to prove such non-compliance under s. 101, s. 102, and s. 103 of the Indian Evidence Act, 1872 (which applies to Kenya and is hereinafter referred to as “the Act”). Those sections, excluding the illustrations, are as follows:

- “101. Whoever desires any court to give judgment as to any legal rights or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
- “When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
- “102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
- “103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

As I have said, in my view s. 11 of the Ordinance makes the proof by the money-lender of certain facts a condition precedent to his success. It is true that the respondent by his defence raised the issue of non-compliance with the provisions of s. 11 of the Ordinance, but having regard to my view of the effect of that section, the last sentence of s. 101 of the Act, and s. 102 and s. 103 of the Act, clearly place the onus on the money-lender, that is on the appellants in this case.

As regards the fourth issue, s. 91 of the Act, excluding the exceptions and explanations which are irrelevant to this matter, reads as follows:

- “91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.”

Section 11 of the Ordinance requires that a note or memorandum in writing be made containing all the terms of the contract. The law thus requires that

the terms of the contract be reduced to the form of a document, and, this being so, under s. 91 of the Act no evidence can be given of such terms except the document itself, unless, of course, it is a case in which secondary evidence of the document is admissible. At p. 504 of Monir's Principles and Digest of the Law of Evidence (4th Edn.) the learned author, in his commentary on s. 91 of the Act, states:

"Therefore, where a contract, grant or disposition of property is itself a matter required by law to be reduced to writing, oral evidence in proof of the terms of that contract, grant or disposition will be inadmissible whether it has been actually reduced to writing or not".

I entirely agree with this statement of the law. In *Subramonian v. Lutchman* (4) (1922), 50 I.A. 77, the Privy Council, when dealing with a case to which the first part of s. 91 of the Act applied, stated at p. 84:

"Their lordships have no doubt therefore that the memorandum in question was the bargain between the parties, and that without its production in evidence the plaintiff could establish no claim."

In my view, therefore, the onus on the money-lender to prove that a note of memorandum in writing conforming to the provisions of s. 11 of the Ordinance was made and signed can be discharged only by production of the note or memorandum itself and, save in a case where secondary evidence is admissible, oral evidence of such note or memorandum is inadmissible.

Having come to these conclusions on the third and fourth issues raised on this appeal, it is necessary to apply them to the facts of the case. The appellants, when plaintiffs before the Supreme Court, were seeking to enforce a contract for the repayment of money lent to Jamal, though as I have stated it makes no difference if they were seeking to enforce the repayment of money lent to Akberali. They were also, in my view, and on the facts found by the learned judge, seeking to enforce against the respondent a security given by the borrower in respect of such contract. Before they could enforce either the contract or the security the onus was on them to prove that the provisions of s. 11 of the Ordinance had been complied with. This they could do only by production of the requisite note or memorandum, as there was no suggestion that this was a case where secondary evidence was admissible. No such note or memorandum in relation either to the original loans, or to the transaction of March 1, or to any subsequent transaction, was produced, but instead they adduced oral evidence which was inadmissible. The appellants, as plaintiffs, had therefore not discharged the onus on them and thus could not succeed against the respondent. The fact that judgment had been entered in default of appearance against Jamal and Akberali was immaterial: see the *Temperance Loan* case (3). It is clear that the requisite note or memorandum must be made and signed in respect not only of the original loan but also in respect of each renewal or variation of the contract for repayment: see *Eldridge's* case (2). The question what is the precise position where the terms of a guarantee given as security for a loan are subsequently varied without reference to the borrower, I leave for subsequent consideration, though I am inclined to think, on the authority of *Central Advance and Discount Corporation Ltd. v. Marshall* (5), [1939] 3 All E.R. 695, that the borrower would have to be a party to such variation and a new note or memorandum would have to be made and signed at least where more onerous conditions are imposed. On this case it is clear that the guarantee given on August 18, 1958, was a variation of the guarantee given on March 1, 1958, that is, it was a variation of a security given by the borrower for the repayment of money, and it thus itself became a security given by the borrower for the repayment of money. As the contract for the repayment of the money

by the borrower was not enforceable, it may be that in any event the security for such contract is unenforceable, but as was said in the *Temperature Loan* case (3), it is unnecessary to consider this aspect as s. 11 of the Ordinance specifically makes the security itself unenforceable unless the provisions of the section have been complied with. There has been a faint suggestion that the guarantee of August 18, 1958, was not a security for the repayment of a loan but for the due performance of the liability of the maker of a promissory note which was the security for the loan. On the facts as found by the learned judge and on my view of the facts, this is not the position. In any event, the guarantee given on March 1, 1958, was clearly a security given by the borrower. The guarantee given on August 18, 1958, was a variation of that given on March 1, and must stand on the same footing, that is, as a security given by the borrower.

For these reasons I would dismiss this appeal with costs and confirm the judgment and decree of the Supreme Court, though for different reasons from those given by the learned judge. I would also give a certificate that the case was fit for two counsel.

Sir Kenneth O'Connor P: I agree. There will be an order as proposed by Newbold, J.A.

Crawshaw JA: I also agree.

Appeal dismissed.

For the appellants:

JM Nazareth QC and PV Raichura

For the respondent:

Ivor Lean QC and J Verjee

For the appellants:

Advocates: *Kohli, Patel & Raichura*, Kisumu

For the respondent:

Jones & Jones, Kisumu

Re an Application by Fenwick J Ghifunda [1961] 1 EA 623 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	2 December 1961
Case Number:	8/1961
Before:	Murphy J

[1] *Habeas corpus – Arrest in Tanganyika – Warrant issued by magistrate in Northern Rhodesia –*

Offences alleged involving conspiracy to destroy property – Whether court has power to order return of applicant – Offences charged alleged to be of political nature – Criminal Procedure Code, s. 348 (d) (T.) – Fugitive Offenders Act, 1881, s. 10, s. 12, s. 14 and s. 19 – East African Fugitive Offenders Order-in-Council, 1920, Art. 2 (1) – The Tanganyika Order-in-Council, 1920, Art. 14 (iv) (d) (T.) – Extradition Act, 1870, s. 3.

Editor's Summary

The applicant was arrested in Dar-es-Salaam on an authenticated warrant issued by a resident magistrate in Northern Rhodesia, and was brought before a magistrate at Dar-es-Salaam who made an order under s. 14 of the Fugitive Offenders Act, 1881, for his return to Northern Rhodesia. The applicant was arrested on two counts, first, that he conspired with others to destroy or damage with explosives buildings, bridges, telephone wires and beer halls in certain specified districts and, secondly, that he counselled or procured certain persons to destroy or damage by an explosive substance the Kitwe Girls' High School and Komomba Beer Hall in the Kitwe district. The applicant applied for directions in the nature of habeas corpus under s. 348 (b) of the Criminal Procedure Code and it was submitted on his behalf that the magistrate had no jurisdiction to make the order because Tanganyika and Northern Rhodesia were not both members of any group of British Possessions to which Part II of the Fugitive Offenders Act applied. It was further submitted that the applicant should be discharged under s. 19 of the Act as the offences charged were of a political character, and that under art. 14 (iv) (c) of the Tanganyika Order in Council, 1920, the Governor is not bound to return a fugitive offender to a British Possession unless satisfied that the proceedings to obtain his return were taken with the consent of the Governor of that Possession, as to which there was no material before the court.

Held –

- (i) it was arguable that the offences with which the applicant was charged could not properly be described as being of a political character. *Re Castioni*, [1891] 1 Q.B. 149 distinguished.
- (ii) it was, however, impossible to say that it would be unjust or oppressive or too severe a punishment to return the applicant for trial.
- (iii) article 14 (iv) (c) of the Tanganyika Order in Council, 1920, was only relevant where the Governor of Tanganyika himself made an order for the return of a fugitive, as he was entitled to do in certain circumstances under Part I of the Act.
- (iv) if the Order in Council intended that the court should be satisfied that the consent of the Governor of the requisitioning possession had been obtained it would have said so; in any event, this was a proper case for the application of the maxim “omnia praesumuntur rite esse acta” and it was scarcely conceivable that a police officer should have been sent to Dar-es-Salaam from Northern Rhodesia to arrest the applicant without the consent or approval of the Governor of that territory.

Application refused. Magistrate's order affirmed.

Cases referred to:

- (1) *Re Government of India and Mubarak Ali*, [1952] 1 All E.R. 1060.
- (2) *Re Castioni*, [1891] 1 Q.B. 149.

Judgment

Murphy J: This is an application for directions in the nature of habeas corpus under s. 348 (b) of the Criminal Procedure Code. The applicant was arrested in Dar-es-Salaam on a duly authenticated warrant issued by a resident magistrate in Kitwe, Northern Rhodesia. He was brought before a resident magistrate in Dar-es-Salaam who made an order under s. 14 of the Fugitive Offenders Act, 1881 (hereinafter referred to as “the Act”), that the applicant be returned to Northern Rhodesia, and that for this purpose he be delivered into the custody of Senior Superintendent Brockwell of the Northern Rhodesia Police, who is the respondent to the present application.

Mr. Fraser Murray’s first submission on behalf of the applicant is that the learned magistrate in Dar-es-Salaam had no jurisdiction to make the order, because Tanganyika and Northern Rhodesia are not both members of any group of British Possessions to which Part II of the Act applies. Here it is necessary to quote s. 12 of the Act, which is the first section in Part II:

“12. This Part of this Act shall apply only to those groups of British Possessions to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same.

“It shall be lawful for Her Majesty from time to time by Order in Council to direct that this Part of this Act shall apply to the group of British Possessions mentioned in the Order, and by the same or any subsequent Order to except certain offences from the application of this Part of this Act, and to limit the application of this Part of this Act by such conditions, exceptions and qualifications as may be deemed expedient.”

Mr. Murray next referred to the East Africa Fugitive Offenders Order in Council, 1920, art. 2(1) of which reads as follows:

“Part II of the Fugitive Offenders Act, 1881, shall apply to the Colony of Kenya and the territories named in the first column of the Schedule to this Order.”

The Schedule to the Order in Council includes the Tanganyika Territory, but does not include Northern Rhodesia. However, art. 2 (2) provides as follows:

“The foregoing provision shall be deemed to be in addition to and not in substitution for any provision of the like nature made in respect of the said Colony by any other Order in Council, or in respect of the territories named in the first column of the Schedule to this Order by the Orders in Council mentioned in the second column thereof and respectively set opposite to the names of the said territories specified as aforesaid in the first column thereof.”

In the second column of the Schedule opposite to “The Tanganyika Territory” there appears the “The Tanganyika Order in Council, 1920”. Turning to this Order in Council one finds the following provision in art. 14:

“(iv) With respect to the Fugitive Offenders Act, 1881:

- (d) For the purposes of Part II of the said Act, the East Africa, Uganda and Zanzibar Protectorates and the Tanganyika Territory and all British Possessions and Protectorates in Africa south of the Equator shall be deemed to be one group of British Possessions.”

Mr. Murray's submission is that this paragraph does not constitute an application of Part II of the Act to any group of possessions. He contrasts the wording of it with the wording of art. 2 (1) of the East Africa Fugitive Offenders Order in Council, 1920, which, as he rightly says, does constitute a very clear application of the Act to a group of possessions not including Northern Rhodesia. The question then is, what is the object of art. 14 (iv) (d) of the Tanganyika Order in Council, 1920? In Mr. Murray's submission this paragraph does no more than define a group of possessions to which Part II of the Act might be applied at some future date.

With respect, I am unable to agree with this submission. Article 2 (2) of the East Africa Fugitive Offenders Order in Council, 1920, clearly contemplates that some provision for the application of Part II of the Act is to be found in the Tanganyika Order in Council, 1920. This provision is in my view to be found in art. 14 (iv) (d). It is difficult to see what would be the object of merely defining a group of possessions to which Part II of the Act might be applied. I do not think that art. 14 (iv) (d) can mean anything else except that Part II of the Act is applied to the group of possessions and protectorates referred to therein. The fact that a different and more lucid form of wording is used in another Order in Council for the application of Part II of the Act does not seem to me to be material. Northern Rhodesia being south of the Equator is included in the group referred to in art. 14 (iv) (d) and I therefore hold that Tanganyika and Northern Rhodesia are both members of a group to which Part II of the Act has been applied.

Mr. Murray's next submission raises a more complex issue. This submission is that the applicant should be discharged under s. 19 of the Act, the first paragraph of which reads as follows:

"Where the return of a prisoner is sought or ordered under this Part of this Act, and it is made to appear to a magistrate or to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too serve a punishment, to return the prisoner either at all or until the expiration of a certain period, the court or magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the magistrate or court seems just."

For the sake of clarity I will first summarise briefly the grounds on which this submission is made. It is said that the offences with which the applicant is charged are of a political character. Section 19 of the Act is similarly worded to s. 10. Section 10 is in Part I of the Act and this part deals with a different procedure for the return of fugitive offenders. There is English authority to the effect that in regard to applications under s. 10 the court will apply the same rules as it does under s. 3 (1) of the Extradition Act, 1870. The latter section specifically provides that a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character. A similar provision is to be found in the Fugitive Criminals Surrender Ordinance (Cap. 22 of the Tanganyika Laws).

That in outline is the argument put forward on behalf of the applicant, and I will now set it forth in greater detail. The charge upon which the applicant was arrested contains two counts. In the first count it is alleged that he conspired with others to destroy or damage with explosives buildings, bridges, telephone wires and beer halls in certain specified districts; and in the second count it is alleged that he counselled or procured certain persons to destroy or damage by

an explosive substance the Kitwe Girls' High School and Komomba Beer Hall in the Kitwe district. In support of the present application an affidavit has been sworn by one Robert Speedwell Makasa who states himself to be the Provincial President of the United National Independence Party of Northern Rhodesia and the Party's representative in Tanganyika. He is aware, according to the affidavit, that on the dates stated in the charge, there were widespread outbreaks of violence in Northern Rhodesia which included the destruction or damaging with explosives of buildings, bridges, schools, beer halls and other property. It is said that these outbreaks were part of a political protest by the people of Northern Rhodesia against certain constitutional proposals which had been announced by the Secretary of State for the Colonies in London. The affidavit concludes as follows:

- "6. I believe that the persons who were responsible for these acts of violence, whoever they may be, perpetrated the same in the belief that no other means were open to them of expressing their disapproval of the aforesaid proposals as varied. There was a danger at one time that these acts would develop into a serious political uprising on the part of the people of Northern Rhodesia, but this has fortunately been averted and violence has now subsided. This followed a further announcement by the Secretary of State for the Colonies that reconsideration would be given to the constitutional proposals aforesaid.
- "7. For the above reasons I respectfully submit that the offences contained in the charge on which it is sought that the above-named Fenwick John Chifunda be extradited are offences of a political character."

No counter-affidavit has been filed, and I do not think that it is contested on behalf of the respondent that the offences with which the applicant is charged had a political background. I agree that in deciding whether to apply s. 19 of the Act, this court should be guided by the same considerations as have influenced the English Courts in the application of s. 10. In this connection Mr. Murray relies on the case of *Re Government of India and Mubarak Ali Ahmed* (1), [1952] 1 All E.R. 1060. That was an application for a writ of habeas corpus by a person who had been detained in custody under s. 5 of the Act, pending his return to India to answer a charge of forgery. The application was refused, but in the course of his judgment, after quoting s. 10 of the Act, Lord Goddard, C.J. said (at p. 1063):

"Affidavits have been filed in which it is suggested that the applicant is being persecuted as a political offender. I am quite sure that in a proper case the court would apply the same rules with regard to applications under the Fugitive Offenders Act, 1881, as it does under s. 3 (1) of the Extradition Act, 1870. If it appeared that the offence with which the prisoner was charged was in effect a political offence, no doubt this court would refuse to return him. The sort of case that has arisen (*e.g. Re Castioni*) is where a man has been charged with murder and it is shown that there was a revolution in the country where he was and that the alleged murder was committed in the course of the revolution and was regarded as a political matter. In such a case extradition has been refused."

The case here referred to, *Re Castioni* (2), [1891] 1 Q.B. 149, concerned a prisoner who had been arrested in England on the requisition of the Swiss Government on a charge of murder, and had been committed by a magistrate for extradition. On an application for habeas corpus it had to be decided what was meant by the words "of a political character" in s. 3 (1) of the Extradition Act, 1870. The court adopted the meaning suggested in SIR James Stephen's History of the Criminal Law, and held that to bring an offence within the

meaning of the words it must be incidental to and form part of political disturbances. At first sight this would seem to apply to the present case, but the facts of *Re Castioni* (2), were very different, as is shown by the following passage from the judgment of Denman, J. at p. 157:

“ . . . I do not think it is disputed, or that now it can be looked upon as in controversy, that there was at this time existing in Ticino a state of things which would certainly show that there was more than a mere small rising of a few people against the law of the State. I think it is clearly made out by the facts of this case that there was something of a very serious character going on—amounting, I should go so far as to say, in that small community, to a state of war.”

There follows a description of the incident which gave rise to the charge of murder. It consisted of an attack by an armed body of men upon the Municipal Council Chamber in which the Government of the State used to assemble. Denman, J., concluded that Castioni was from the first an active party, one of the rebellious party who was acting in the attack against the Government. All this is very removed from the offences charged in the present case.

In the course of his argument for the respondent, Mr. Lockhart-Smith said that the offences with which the applicant is charged are ordinary offences against the criminal law. This is perfectly true, but, as Mr. Murray rightly submitted, that does not prevent them from being of a political character in a particular set of circumstances. Murder is an ordinary offence against the criminal law, yet the murder in *Castioni's* case (2), was held to be an offence of a political character. I think that Mr. Lockhart-Smith was on stronger ground when he said that what must be shown is a real division in the country, amounting to revolution, with two potential Governments see-sawing against each other. That would seem to have been the position in *Castioni's* case (2). However, although at first sight it would appear that all I have to decide is whether the offences charged against the applicant are of a political character, the position as I see it is not really so simple as that. I would observe here that both before the resident magistrate in Dar-es-Salaam and before Law, J., who heard the preliminary application in the present matter, it was submitted by learned counsel then appearing for the applicant (not Mr. Murray) that the application for the prisoner's return to Northern Rhodesia was not made in good faith. This is one of the considerations specifically referred to in s. 19 of the Act as a ground upon which the court may decide to discharge the prisoner. Mr. Murray, however, has wisely abandoned the allegation of bad faith, and relies in this part of his argument solely on the alleged political character of the offences. But it is to be observed (and I come here to a point which was not argued by Mr. Lockhart-Smith) that in s. 10 and s. 19 of the Act, unlike s. 3 (1) of the Extradition Act, 1870, the criterion of the offence having a political character is not specifically mentioned. The only authority to which I have been referred for applying this criterion is the observation (made obiter) of Lord Goddard in the *Government of India* case (1). This observation is entitled to very great respect, and I have no doubt that the political nature of an offence is a factor which must be borne in mind. But whatever factors are taken into consideration the ultimate question which the court has to decide under s. 10 and s. 19 is whether it would be unjust or oppressive or too severe a punishment to return the prisoner. It is in my view impossible to say that the fact of an offence having a political background, even if the offence can properly be described as being of a political character, is by itself a reason for holding that the return of a prisoner would be unjust or oppressive or too severe a punishment, and I do not think that Lord Goddard can have intended to lay down so wide a proposition as this in the *Government of India* case (1).

It is easy to understand the relevance of the political factor, and one can certainly conceive of countries in which the kind of justice administered would make it unjust and oppressive to order the return of a person charged with a political offence. But in Northern Rhodesia, as in other countries of the Commonwealth, justice is administered independently of the Executive by persons who have taken a judicial oath. I cannot do better here than quote another passage from Lord Goddard's judgment in the *Government of India* case (1) at p. 1063:

“... I think it would be an impossible position for this court to take up to say that they would not return a person for trial to a country which is a member of the Commonwealth and where it is known that courts of justice have been presided over by Indian judges for very many years because we thought the court would not give him a fair trial. That would be an insult to the courts of India. It seems to me that under the words of s. 10 of the Act of 1881, wide as they may be, we cannot say that it would be unjust or oppressive to return this man to India to take his trial.”

It seems to me that, *mutatis mutandis*, that is precisely the position in the present case.

For these reasons I hold, first, that it is arguable that the offences with which the applicant is charged cannot properly be described as being of a political character. In this respect they certainly fall short of the offence which was charged in *Re Castioni* (2). Secondly, and more important, it is in any event impossible to say that it would be unjust or oppressive or too severe a punishment to return the applicant for trial.

Mr. Murray finally referred to art. 14 (iv) (c) of the Tanganyika Order in Council, 1920, which provides that the Governor shall not be bound to return a fugitive offender to a British Possession unless satisfied that the proceedings to obtain his return are taken with the consent of the Governor of that Possession. Mr. Murray submitted that there is nothing before this court to show that the proceedings to obtain the applicant's return were taken with the consent of the Governor of Northern Rhodesia. This submission, I think, took Mr. Lockhart-Smith by surprise. After taking instructions in court, he informed me that the proceedings did have the approval of the Governor, and that if given time he could establish this. My view on this point is that the paragraph to which Mr. Murray has referred is only relevant where the Governor of Tanganyika himself makes an order for the return of a fugitive, as he is entitled to do in certain circumstances under Part I of the Act. If the Order in Council intended to impose a duty upon the court to be satisfied that the consent of a Governor of the requisitioning possession had been obtained, it would have said so. But even if I am wrong in this view, I consider that this is a proper case for the application of the maxim *omnia praesumuntur rite esse acta*. It is scarcely conceivable that a police officer should have been sent to Dar-es-Salaam from Northern Rhodesia to arrest the applicant without the consent or approval of the Governor of that Territory.

The application is accordingly refused, and the order of the resident magistrate of Dar-es-Salaam directing the applicant's return to Northern Rhodesia must stand.

Application refused. Magistrate's order affirmed.

For the applicant:

WD Fraser Murray

For the respondent:

WJ Lockhart-Smith

For the applicant:

Advocates: *Fraser Murray, Thornton & Co*, Dar-es-Salaam

For the respondent:

WJ Lockhart-Smith, Dar-es-Salaam

Tanganyika Mine Workers Union v The Registrar of Trade Unions [1961] 1 EA 629 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam

Date of judgment: 17 November 1961

Case Number: 3/1961

Before: Murphy J

[1] *Trade Union – Contravention by union secretary of statute governing unions – Cancellation by registrar of registration of union – Whether a contravention by secretary equivalent to contravention by trade union – Trade Union Ordinance (Cap. 381), s. 14, s. 15, s. 32 and s. 44 (T.) – Trade Union Decree, 1941, s. 17 (Z.).*

Editor's Summary

The registrar had under s. 14 of the Trade Union Ordinance cancelled the registration of the appellants on the ground that the union had wilfully contravened the provisions of s. 44 (1) of the Ordinance. Under this section the secretary of every registered trade union is required to give the registrar on or before March 31 an audited general statement of all receipts and expenditure during the preceding year ending on December 31 and of its assets and liabilities. Section 44 (4) provides that in the event of failure to comply with these requirements the secretary of the union shall be liable to a fine not exceeding Shs. 500/-. The appellants appealed under s. 15 against the order of cancellation on the ground, *inter alia*, that the order was bad in law as s. 44 (1) laid a duty on the secretary of the union concerned and not on the trade union itself, and that the section, therefore, could not be contravened by the union.

Held –

- (i) by the ordinary rules of construction it was impossible to hold that a contravention by the secretary of s. 44 (1) was equivalent to contravention by the union.
- (ii) it was difficult to see why the appellants should be held responsible for an act of this kind committed by one of their officers.
- (iii) it was not open to the registrar to cancel the registration of the appellants on the ground relied on.

Appeal allowed. Order of cancellation of registration annulled.

Cases referred to:

- (1) *London County Council v. Aylesbury Dairy Company Ltd.*, [1898] 1 Q.B. 106.
- (2) *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163.
- (3) *Taff vale Railway Company v. Amalgamated Society of Railway Servants*, [1901] A.C. 426.
- (4) *Unguja and Pemba Transport Workers Union v. The Registrar of Trade Unions*, [1958] E.A. 722 (Z.).

Judgment

Murphy J: This is an appeal under s. 15 of the Trade Unions Ordinance (Cap. 381) (hereinafter referred to as “The Ordinance”) against an order of cancellation of registration made by the registrar of trade unions. The terms of the Order are as follows:

“It is hereby ordered that the registration of Tanganyika Mine Workers Union as a trade union under the Trade Unions Ordinance be and is this day cancelled. The grounds of such cancellation are as follows:

“That the trade union has wilfully and after notice from me contravened the provisions of s. 44 (1) of the Trade Unions Ordinance.”

This order purports to be made under s. 14 of the Ordinance. The relevant part of the section reads as follows:

“(2) The registration and the certificate of registration of a registered trade union may be cancelled by the registrar if he is satisfied:

.....

(e) that the trade union has wilfully and after notice from the registrar contravened any provision of this Ordinance . . .”

Section 44 (1), which is alleged to have been contravened, provides:

“The secretary of every registered trade union shall furnish annually to the registrar on or before the 31st day of March a general statement audited in the prescribed manner of all receipts and expenditure during the period of twelve months ending on the 31st day of December of the preceding year, and of the assets and liabilities of the trade union as at such 31st day of December. The statement shall be accompanied by a copy of the auditor’s report and shall be prepared in such form and shall comprise such particulars as may be prescribed.”

Section 44 (4) provides that a secretary of a trade union who fails to comply with any of these requirements shall be liable to a fine not exceeding Shs. 500/–

The following are the first two grounds of appeal:

1. The order of cancellation is bad in law, as s. 44 (1) of the Trade Unions Ordinance (Cap. 381) lays a duty on the secretary of the trade union concerned, and not on the trade union itself, and the section cannot therefore be contravened by the trade union.
2. Section 44 (4) prescribes the penalty to which the secretary of a trade union, who fails to comply with the requirements of the section, is liable, and there is therefore no room for any other general penalty for a contravention of the section.”

I may say at once that I am not impressed by the second of these two grounds. In my view the provision of a particular penalty in the section cannot by itself exclude the operation of any general penalty which may be prescribed elsewhere. On behalf of the appellants Mr. Thornton conceded that where a section provides that the trade union itself shall be liable to a fine (as, for example, s. 32), a contravention of that section would nevertheless render the union liable to have its registration cancelled under s. 14 (2)(e). It does not appear to me therefore that s. 44 (4) is of any assistance to the appellants except, as Mr. Thornton argued, insofar as it emphasises that the responsibility for complying with s. 44 (1) is on the secretary.

However, to say that s. 44 (4) is not of any assistance in no way detracts from the merits of the first ground of appeal. I agree with Mr. Thornton’s argument that by the ordinary rules of construction it is impossible to hold that a contravention by the secretary of s. 44 (1) is equivalent to contravention by the union. My attention was drawn to s. 14 (2) (g) and s. 42 and s. 43. Under s. 14 (2) (g) the registration may be cancelled if the accounts of the union are not kept in accordance with the provisions of the Ordinance. Section 42 and s. 43 impose certain duties upon the treasurer and other officers of the union in connection with the keeping of accounts. If a contravention of these duties were to be regarded as a contravention by the union, the registrar would have power to cancel the registration under para. (e) of s. 14 (2) and para. (g) would be superfluous. This is a weighty argument in favour of the appellants, though it is not perhaps conclusive. I am more impressed by the argument that the

provisions of the Ordinance which are relevant to this appeal are penal provisions and must be construed strictly. Mr. Thornton referred to the following observation of Wright, J., in *London County Council v. Aylesbury Dairy Company Ltd.* (1), [1899] 1 Q.B. 106, at p. 109:

“I have certainly always understood the rule to be that where there is an enactment which may entail penal consequences you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language.”

With this I respectfully agree and I think that it would be doing violence to the language of the Ordinance to interpret s. 44 (1) as imposing upon the union a duty, the contravention of which renders it liable to have its registration cancelled.

For the respondent, Mr. Denison has argued that this is not a matter which can be decided by the ordinary canons of statutory interpretation alone and that regard must be had to the nature of a trade union and to the relationship between a trade union and its officers. He referred to the following observation of Farwell, J., in *Osborne v. Amalgamated Society of Railway Servants* (2), [1909] 1 Ch. 163, at p. 191:

“A registered trade union is thus a statutory legal entity, anomalous in that, although consisting of a fluctuating body of individuals and not being incorporated, it can own property and act by agents”.

Mr. Denison emphasised the words, “and act by agents” and submitted that a trade union can act in no other way and that there is a close identification between a trade union and its officers. Accordingly, he argued, s. 44 (1) of the Ordinance places a duty upon the union but is drafted so as to recognise the fact that the union acts through its officers. The responsibility is therefore placed on the appropriate officer, namely the secretary, for furnishing the return. But this in Mr. Denison’s submission does not absolve the union from its liability if the secretary defaults.

Mr. Denison also referred to the well-known case of *Taff Vale Railway v. Amalgamated Society of Railway Servants* (3), [1901] A.C. 426, but that case was concerned with the question of vicarious liability in tort and does not in my view assist in determining what was the statutory responsibility of the appellants in the present case.

There is no English authority on the point now at issue, for the simple reason that in England no appeal lies from an order similar to the one which is the subject of this appeal. I have been referred to a Zanzibar case, *Unguja and Pemba Transport Workers Union v. The Registrar of Trade Unions* (4), [1958] E.A. 722 (Z.). That case, like the present one, was an appeal against an order of cancellation of registration which had been made on the ground of wilful failure to submit accounts. The appeal was dismissed, but the decision turned on the wording of s. 17 of the Trade Unions Decree, 1941. This section provides for the preparation of a statement of accounts, but its wording is substantially different from s. 44 of the Ordinance. Section 17 (3) of the Zanzibar Decree provides as follows:

“If any trade union . . . acts in contravention of this section, the officer of such trade union who is responsible for such failure or act shall be guilty of an offence against this decree”.

The responsibility of the trade union as well as that of its officer for complying with the section could scarcely have been made clearer.

Mr. Denison is asking me to hold that in every case where an officer of a

union defaults in the performance of some function which he exercises as an officer of that union, his default is the default of the union and the union is liable. In my view this proposition is much too wide. I agree that a union can act only through its officers and it follows that where a duty is cast upon the union that duty must be performed by one or more of its officers and the union will be responsible for their default. But it is an entirely different thing to say that where a duty is cast on an officer of the union, his default becomes the default of the union. This, as Mr. Thornton submitted, is to turn upside down the usual rule of the liability of a principal for the acts of his agent. I am fortified in this view by a consideration of s. 44 (5) of the Ordinance which provides *inter alia* that every person who wilfully and knowingly makes a false entry in a general statement delivered to the registrar shall be liable to imprisonment for one year. It is difficult to see why the union should be held responsible for an act of this kind committed by one of its officers, yet Mr. Denison's argument led him to submit that if a secretary wilfully put false particulars in the returns, that would be a contravention of the section by the union and the union would be liable to have its registration cancelled.

For these reasons I consider that it was not open to the registrar to cancel the appellant's registration on the ground that their secretary had contravened s. 44 (1) of the Ordinance. It is therefore unnecessary for me to deal with the other able and interesting arguments which have been addressed to me on the subject of whether the contravention was wilful or whether, even if the order of cancellation was lawful, this court has jurisdiction to grant relief.

The appeal is allowed with costs. The order of cancellation of registration is annulled with effect from the date on which it was made.

Appeal allowed. Order of cancellation of registration annulled.

For the appellant:

RS Thornton

For the respondent:

WN Dennison (Crown Counsel, Tanganyika)

For the appellant:

Advocates: *Fraser Murray, Thornton & Co*, Dar-es-Salaam

For the respondent:

The Attorney-General, Tanganyika

Benegnus Paulo and another v R
[1961] 1 EA 633 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam

Date of judgment: 4 October 1961

Case Number: 466 and 467/1961

Before:

Weston J

[1] Criminal law – Rogues and vagabonds – Accused charged with burglary – Charge withdrawn – Accused then charged as being rogues and vagabonds – Particulars given of specific circumstances supporting charge – Whether charge and conviction proper – Meaning of “suspected person” – Penal Code, s. 177(3) and s. 297(T.) – Criminal Procedure Code, s. 297 (T.).

Editor’s Summary

On July 29, 1961, the appellants and two others were arrested and held in custody on suspicion of having committed a burglary on July 28. On July 31, they were charged before a district court with this offence under s. 297 of the Penal Code but were not asked to plead. On August 10 the police obtained leave to withdraw the charge laid and the accused were then charged under s. 177(3) of the Penal Code with “being suspected persons and reputed thieves who have no visible means of subsistence and cannot give a good account of themselves”. The appellants made unsworn statements which did not account for their movements on July 28 and were convicted and sentenced. The appellants thereupon appealed against conviction and sentence.

Held –

- (i) s. 177 (3) of the Penal Code was not intended as a convenient method for supplying a hiatus in the evidence of felony. *R. v. Cadwell*, 20 Cr. App. R. 60 applied.
- (ii) the words “suspected person” appearing in s. 177 (3) *ibid.* are not to be construed as “person suspected of having committed a specific offence”; they mean a person suspected of sustaining himself by dishonest means and the evidence to be adduced by the Crown in support of such an allegation must necessarily be general in character and not, as in this case, related to a particular offence.

Appeal allowed. Convictions quashed and sentences set aside.

Cases referred to:

- (1) *Omari Ramadhani and Another v. R.* (1955), 2 T.L.R. (R.)118.
- (2) *R. v. Frederick Dean*, 18 Cr. App. R.133.
- (3) *R. v. Brown*, 1 Cr. App. R. 85.
- (4) *R. v. Cadwell*, 20 Cr. App. R. 60.

Judgment

Weston J: The appellants were deemed to be rogues and vagabonds by the District Court of Songea, at Songea, and each was sentenced to three months’ imprisonment. The charge was laid under s. 177 (3) of the Penal Code and the particulars of the offence were as follows:

“The persons charged in the month of July in the area of the Namabengo Roman Catholic Mission, in the District of Songea, being suspected persons and reputed thieves, who have no visible means of subsistence and cannot give a good account of themselves.”

The appellants appeal against conviction and their appeals are consolidated. Two other persons were charged together with the appellants and they also

were found to be rogues and vagabonds and each was sentenced to three months' imprisonment, but they have not appealed.

It will be observed that the Crown took upon itself the onus of proving that the appellants were both suspected persons *and* reputed thieves, and that the place where the misdemeanour was alleged to have occurred was

“in the area of the Namabengo Roman Catholic Mission, in the District of Songea”.

The facts are these. On the night of July 28/29, 1961, the Namabengo Roman Catholic Mission was broken and entered by a gang with intent to steal. The gang was disturbed by the stout-hearted priest in charge of the Mission, and fortunately nothing appears to have been taken. The next morning the appellants and their two co-accused were brought to Songea Police Station where they were held on suspicion of having committed this offence. They refused to say where they had been the previous night. On July 31 they were taken before the court and charged under s. 297 of the Penal Code with the offence, but they were not asked to plead. The prosecution asked for seven days remand “to enable investigation to be done and witnesses to be assembled”. This was granted. On August 8 a further remand was granted and on August 10, the police asked for leave to withdraw the charge laid under s. 297 of the Penal Code. Leave was given pursuant to s. 86(a) of the Criminal Procedure Code and a fresh charge was read to the accused, who pleaded not guilty. This was the charge laid under s. 177 (3) of the Penal Code, the particulars of which I have read out.

It could not be plainer, therefore, that a case which started with an assertion by the Crown that it would establish the guilt of the accused on a charge of breaking and entering the Mission, proceeded for lack of evidence on the footing of what was in effect a demand by the prosecution that the accused should show cause why they should not be suspected of having committed that very offence—a case indeed, of which it may be said with truth, if with some slight re-arrangement of the poet's words, that it started with a bang and ended in a whimper.

It cannot be doubted that the appellants and their co-accused were convicted substantially because they did not show such cause. Paragraph 4 of the judgment reads as follows:

“The accused in court, as previously to the police have made no attempt to explain the circumstances which brought them to the Namabengo area. I warned the accused when they intimated that they did not wish to make a sworn statement that I would be entitled to draw an adverse inference from their refusal to submit to cross-examination on this point. The accused were found in *prima facie* suspicious circumstances having regard to the events of the day and night of the 28th and 29th. A reasonable explanation of their presence was in my opinion called for. Even in their unsworn statements they did not trace their movements on the 28th, from the time when they alighted from the bus at the road junction until they appeared at 10 a.m. on the following day (according to their story) at Hanga. Hanga and Namabengo are within a few hours' walk of each other, and the Namabengo Mission is on the road to Hanga. I find that the accused have not given any reasonable explanation of their presence in the area.”

and in para. 5 the magistrate said:

“The four accused were seen by most reliable witness, the Priest of Hanga, to be hanging around the Namabengo Mission during the afternoon and evening of the 28th. That night the Mission was burgled, and it would appear that the burglary was the work of more than one man. When asked

to explain their presence in Namabengo Mission they said that they were visiting sick relatives. This was a lie. They said that they had come from Matimira, again this was a lie. Three of the accused had been released only three days previously from Lilunga Prison, where the fourth accused has also been recently imprisoned, for the offence of breaking into and stealing from the Kitanda Mission in this district.”

The reliable witness mentioned by the magistrate was a Father Gregory of the Benedictine Order, and his transparent honesty indeed leaps from the record. He testified in particular as follows:

“I opened the door, and flashed my torch. The window had been forced open. A youth jumped from behind a cupboard. He jumped through the window. As he jumped through the window, he called out, as if he was warning other people. He was dressed in a shirt and shorts. The shirt was a rust colour, but I cannot be certain; it was only by torchlight. I could not recognize that person, and cannot be certain now. But I have a good idea that it was the first accused.”

Such, then, were the salient features marking the course of the proceedings in the court below and, of course, if such course is justified by law the appellants have no redress in this court. The question is, is it?

It seems to me that there are two answers to this question, one based on general principle, and the other on the interpretation of the specific provision of law under which the appellants were charged.

As to the first, there is not in England a provision of law as wide in its terms as s. 177 (3) of the Penal Code. What Harbord, J., in *Omari Ramadhani and Another v. R.* (1) (1955), 2 T.L.R. (R.) 118, called the “nearest provisions in English law” (at p. 120) are to be found in the Vagrancy Act, 1824. In relation to these, in the case of *Frederick Dean* (2), 18 Cr. App. R. 133, Hewart, L.C.J., said (at p. 134):

“It looks very much as if it was thought that there was not enough evidence to charge the appellant with attempted housebreaking, and this other method was adopted. It would be in the highest degree unfortunate if in any part of the country those who are responsible for setting in motion the criminal law should entertain, connive at or coquette with the idea that in a case where there is not enough evidence to charge the prisoner with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the Vagrancy Act, 1824.”

Some three years later one Henry Cadwell was convicted at Burnley Borough Sessions as an incorrigible rogue and sentenced to 12 months’ imprisonment with hard labour. He appealed against sentence, there being no appeal against conviction (see *R. v. Brown* (3), 1 Cr. App. R. 85.). Learned Counsel for the respondents said (*R. v. Cadwell* (4), 20 Cr. App. R. at p. 60 and p. 61):

“He is a reputed thief, but it must be admitted that in this instance the charge was made because it was thought that there was not sufficient evidence of the larceny of which he was suspected.”

The judgment of Talbot, J., (20 Cr. App. R. at p. 61) may be set out in full:

“The Vagrancy Act of 1824 was not intended as a convenient method for supplying a hiatus in the evidence of felony. In *F. Dean*, 18 Cr. App. R. 133: 1924, the Lord Chief Justice made remarks to this effect, and the court reduced the sentence to one day’s imprisonment. We, fortified by counsel’s view, do the same now.”

In my judgment, this principle is as valid in this Territory in relation to s. 177 (3) of the Penal Code, as it is in England in relation to the Vagrancy Act.

But it may be contended that the corresponding provision of law in this country is in terms wide enough to indicate the intention of the legislature to make it a misdemeanour to be suspected of having committed an offence. I do not think so. It would require words far more explicit than any to be found in s. 177 (3) of the Penal Code to lead me to a conclusion so startling. The words “suspected person” appearing therein are not, in my view, to be construed “person suspected of having committed a specific offence”. As I read them in their context, they mean a person suspected of sustaining himself by dishonest means, and the evidence to be adduced by the Crown in support of such an allegation must necessarily be general in character and not, as in this case, related to a particular offence. The evidence of the priest which I have quoted was, in my view, inadmissible.

For these reasons I allow this appeal, and I quash the conviction of each of the appellants and set aside the sentence imposed in respect of it. I do so, I may say, with some reluctance, for there was ample evidence that they were reputed thieves. They were found with no visible means of subsistence, and the magistrate’s remarks on this point in para. 3 of his judgment are a model of sound common sense. Nor could the appellants give a good account of themselves. But the introduction by the prosecution of the further elements to which I have referred leave me no course open but that which I have taken.

In view of what I have said, it is clear that the conviction of the two persons charged with the appellants cannot stand. In the exercise of my powers of revision I quash the conviction entered in respect of each of them and set aside the sentence imposed.

Appeal allowed. Convictions quashed and sentences set aside.

The appellants did not appear and were not represented.

For the respondent:

MGK Konstam (Crown Counsel, Tanganyika)

For the respondent:

The Attorney-General, Tanganyika

Charan Singh Chadha and another v Mohinder Singh Chadha and others
[1961] 1 EA 637 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 November 1961
Case Number:	6/1960
Before:	Sir Kenneth O’Connor P, Crawshaw and Newbold JJA
Appeal from:	H.M. Supreme Court of Kenya—Wicks, J

[1] Will – Attestation – Will of Hindu in East Africa – Whether attestation necessary – Indian Succession Act, 1865, s. 2, s. 50 and s. 331 – Hindu Wills Act, 1870, s. 2 – East African Order-in-Council, 1897, s. 5 and s. 11 (b) (c) and (e).

[2] Will – Revocation – Hindu in Kenya – Will of property in Kenya – Whether informal intention sufficient to revoke will – Indian Succession Act, 1865, s. 57 – Indian Wills Act, 1870, s. 2 – East African Order-in-Council, 1897, s. 5 and s. 11 (b) (c) and (e).

Editor’s Summary

The appellants and the respondents were sons of one C. who had left three alleged wills. The appellants applied to the court by originating summons to declare and order which of the three alleged wills exhibited as “B”, “C” and “D”, was the last will and testament of the deceased. Exhibits “B” and “D” were signed by the deceased but were not attested in the manner required by s. 50 of the Indian Succession Act, 1865, whereas “C” was signed and properly attested by two witnesses. The appellants sought to establish exhibit “B” and contended that the will of a Hindu did not require attestation. The trial judge rejected exhibits “B” and “D” as being from their appearance incomplete documents which the deceased had not fully and definitively resolved to adopt as his will and pronounced for exhibit “C”. On appeal counsel for the appellants was asked to establish as a preliminary point that exhibits “B” and “D” could be good testamentary documents without attestation by witnesses as required by the Indian Succession Act, 1865. The court assumed, without deciding the point, that the term “Hindu” in the Indian Succession Act, 1865, was intended to include “Sikh”.

Held –

- (i) the Indian Succession Act, 1865, was originally applied to the East African Protectorate by the East African Order in Council, 1897, without any exception for testamentary succession to the property of Hindus, Mohamedans or Buddhists, and s. 50 of the Act requiring attestation continued to apply by virtue of the application to the Protectorate of the Hindu Wills Act, 1870.
- (ii) the effect of the application of the Hindu Will Act, 1870, to the Protectorate was, on the one hand, to apply to the wills of Hindus, Jains, Sikhs and Buddhists in East Africa the rules for the execution, attestation, revocation, revival, interpretation and probate contained in those sections of the Indian Succession Act, 1865, which were enumerated in s. 2 of the Hindu Wills Act, 1870, while, on the other hand, exempting intestate or testamentary succession to the property of any Hindu, Mohamedan or Buddhist in East Africa (and wills made and intestacies occurring before January 1, 1866) from other provisions of the 1865 Act.
- (iii) in accordance with s. 50 of the 1865 Act attestation of the will of a Sikh made in Kenya affecting property situate in Kenya is necessary and accordingly exhibits “B” and “D” were not wills.

- (iv) section 57 of the 1865 Act applies to Kenya; accordingly an informal intention by a Sikh in Kenya to revoke a will of property situate in Kenya is not good without more.

Appeal dismissed.

Cases referred to:

- (1) *Rani Bhagwan Kuar v. Jogendra Chandra Bose* (1903), 30 I.A. 249.
(2) *In re Jethalal Govindji* (1942), T.L.R. (R.) 732.

November 16. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a judgment and decree dated September 16, 1959, of the Supreme Court of Kenya made on an originating summons. The appellants were the applicants and the respondents the respondents to the summons. All are sons of Bishen Singh Chadha, deceased, who died on July 3, 1958. The originating summons prayed the court to declare and order which of three alleged wills—exhibited and marked respectively “B”, “C” and “D”—was the last will and testament of the deceased. The appellants sought to establish “B” which *inter alia* purported to give all the deceased’s plots in Kenya or in India to the appellants and one Balwant Singh; whilst “C” purported to give the deceased’s estate (subject to a trust for sale and a life interest in income to the widow) among his sons in equal shares; and “D” purported to give a life interest to the widow and, among other provisions, to direct division of the proceeds of all the deceased’s buildings among the appellants, the respondents and one Balwant Singh according to the percentages mentioned therein.

Document “C” is dated June 17, 1932, and is obviously drawn by someone with legal knowledge. It is signed and properly attested by two witnesses.

Document “D” is dated October 24, 1958, and purports to be signed by the deceased. Various blanks are left in it and although it concludes:

“I signed in my full sense before the witnesses.

24.10.58. B.S. Chadha.

Kericho”;

it is not, in fact, witnessed.

Document “B” also concludes with:

“I signed in my full sense in presence of:

Witness

Witness

B.S. Chadha.”;

but it also is not attested. Document “B” is undated. The appellants endeavoured to establish its date by testifying that they had found it in an envelope addressed to them and Balwant Singh dated April 25, 1957; but the learned judge did not believe their testimony. It was in evidence that two persons signed document “B” subsequently to the deceased’s death in the spaces left for signatures of witnesses; but the first appellant later cancelled these signatures when told by an advocate that they were “not proper”.

It will be observed, therefore, that documents “B” and “D” were not attested in the manner required

by s. 50 of the Indian Succession Act, 1865. Accordingly, it was contended by the respondents that neither of them could operate as a

will. The appellants, however, contended that the will of a Hindu (which, they said, included a Sikh for this purpose) did not require attestation.

The learned judge did not decide this point, but rejected documents “B” and “D” as being from their appearance incomplete documents which the deceased had not fully and definitively resolved to adopt as his will. The learned judge pronounced for document “C”. On appeal, this court called on Mr. Khanna, counsel for the appellants, to establish as a preliminary point that document “B” or document “D” could be a good testamentary document without attestation by witnesses as required by s. 50 of the Indian Succession Act, 1865.

Mr. Khanna submitted three propositions:

- (1) A Sikh is a Hindu within the Hindu Wills Act, 1870, and the Indian Succession Act, 1865.
- (2) No attestation is necessary for a Hindu will and, as the Hindu Wills Act, 1870, and Indian Succession Act, 1865, only apply to certain Hindu wills, of which this was not one, no attestation was necessary for this will.
- (3) An informal intention to revoke a will is effective as a revocation in Hindu law and was, therefore, effective in this case to revoke document “C”.

There was no substantial conflict between counsel for the appellants and the respondents on proposition (1) above.

Regarding propositions (2) and (3) above it was agreed between counsel that if the court should decide these preliminary propositions in relation to document “B” in favour of the appellants, Mr. Khanna should then be called on to argue the rest of the appeal; but if these propositions should be decided against the appellants, that would be sufficient to dispose of the appeal.

With regard to proposition (1) above, a Sikh is not included in the term “Hindu” in the Wills Act, 1870, which Act throughout refers expressly and separately to wills of Jainas, Sikhs and Buddhists as well as to wills of Hindus. (The provisions of that Act will be noticed in more detail later.) Where, as in the Indian Succession Act, 1865, there is no express mention of Sikhs, the question whether the term “Hindu” is intended to include a Sikh is more difficult. In this connection the proper and ordinary meanings of “Sikh” and of “Hindu” are relevant. Generally speaking, it is incorrect to refer to a Sikh as a Hindu, though this has sometimes been done in colloquial parlance and even in the Law Reports. Sikhism in its inception was a revolt against Brahmanical Hinduism. Its founder Guru Nanak (a contemporary of Martin Luther) was as much a reformer and dissenter from Hinduism as Luther was from Roman Catholicism. Apart from many important differences in religious observance, there are fundamental differences in belief between Sikhs and Hindus. For instance, Hinduism has a strong bias towards pantheism and its adherents may worship countless deities for a variety of reasons, some extolling one, others another. Nanak’s faith, on the contrary, was sternly monotheistic: Encyclopaedia Britannica (1960 Edn.) Vol. 11 p. 174 & Vol. 20 p. 647. Sikhs are, however, to some extent governed by Hindu law; and certain early Indian Acts, regulations and charters did include Sikhs in the designation “Hindu”. As Sir Arthur Wilson said in *Rani Bhagwan Kuar v. Jogendra Chandra Bose* (1) (1903), 30 I.A. 249 at p. 253:

“The framers of the earlier Acts, regulations and charters had a less detailed acquaintance than we have now with the diversities of creed and religious law existing in India.”

It is probable that the Indian Succession Act, 1865, was one of those acts. In s. 331 “Hindu” may have been intended to include “Sikh”. I will assume in favour of that part of Mr. Khanna’s first proposition which refers to the Indian

Succession Act, 1865, that it was so intended, though I do not wish to be taken as deciding the point.

Mr. Khanna's second and third propositions depend to some extent on certain provisions of the Indian Succession Act, 1865, and the Hindu Wills Act, 1870, and their application to Kenya.

The relevant provisions of the Indian Succession Act, 1865, are as follows:

"Section 2. Except as provided by this Act or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession."

"Section 50. Every testator, not being a soldier employed in an expedition, or engaged in actual warfare, or a mariner at sea, must execute his will according to the following rules:

"First: The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

"Second:

"Third: The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

"Section 57. No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same."

"Section 331. The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mohamedan or Buddhist; nor shall they apply to any will made, or any intestacy occurring, before the first day of January, 1866."

The relevant provisions of the Hindu Wills Act, 1870 are as follows:

"An Act to regulate the wills of Hindus, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal and the towns of Madras and Bombay.

Preamble: Whereas it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the wills of Hindus, Jainas, Sikhs and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay; It is hereby enacted as follows:

1. This Act may be called the Hindu Wills Act, 1870.
2. The following portions of the Indian Succession Act, 1865, namely: sections 46, 48, 49, 50, 51, 55 and 57 to 77 (both inclusive), sections 82, 83, 85, 88 to 103 (both inclusive), sections 106 to 177 both inclusive, and 187

shall, notwithstanding anything contained in s. 331 of the said Act, apply:

- (a) to all wills and codicils made by any Hindu, Jaina, Sikh or Buddhist, on or after the first day of September, 1870, within the territories subject to the Lieutenant-Governor of Bengal or the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay, and
- (b) to all such wills and codicils made outside those territories and limits, so far as relates to immoveable property situated within those territories or limits."

Assuming that the word "Hindu" in s. 331 of the Indian Succession Act, 1865, includes Sikh, then, by virtue of that section, the provisions of that Act would not apply to intestate or testamentary succession to the property of a Sikh. That would have been the position in British India from the date of the commencement of the Indian Succession Act, 1865, until the coming into force of the Hindu Wills Act, 1870. The 1870 Act applied certain sections of the Indian Succession Act, 1865 (including s. 50, which, as we have seen, provides rules for the attestation of wills) to (a) wills of Sikhs made after September 1, 1870, within the territories and towns in India specified in para. (a) of s. 2 (hereinafter referred to as "the Indian specified territories so far as related to immoveable property situate within the Indian specified territories. (It is unnecessary to refer to the Indian Succession Act, 1925, as that Act was not, so far as I can ascertain, applied to Kenya.)

I will now deal with the application of the Indian Succession Act, 1865, and the Hindu Wills Act, 1870, to Kenya—or rather to the East Africa Protectorate, of which Kenya formed part. By s. 5 of the East Africa Order in Council, 1897, it was *inter alia* provided that the powers conferred by that Order in Council should extend to (a) British subjects; (b) foreigners; (c) the property and all personal and proprietary rights in the East Africa Protectorate of British subjects and foreigners; and (d) natives, to the extent therein mentioned. By s. 11(b) the enactments mentioned in the Schedule were made applicable to the Protectorate. The Schedule included: "The Indian Succession Act (Act X of 1865) except s. 331."

Thus, the Indian Succession Act, 1865, was originally applied to the East Africa Protectorate without any exception for testamentary succession to the property of Hindus, Mohamedans or Buddhists. There is no doubt, therefore, that the original intention was that s. 50 of the Indian Succession Act, 1865, should regulate the will of a Hindu (and of a Sikh) in the East Africa Protectorate.

By s. 11 (c) of the East Africa Order in Council, 1897, after providing *inter alia* that any other existing or future enactments of the Governor-General of India in Council should be applicable to the Protectorate but should not come into operation until such time as might be fixed by the Secretary of State, it was further provided, by s. 11 (e) (iii), that the Secretary of State might by order modify, for the purpose of the Order in Council, any provision of the said enactments.

On September 30, 1898, the Secretary of State made an Order (apparently under s. 11 of the 1897 Order in Council) as follows:

"In pursuance of Article II of the 'East Africa Order in Council, 1897', I hereby order that the following Acts of the Governor-General of India in Council, that is to say 'The Hindu Wills Act, 1870' (Act XXI of 1870), and the 'Probate and Administration Act, 1881' (Act V of 1881), and any enactment amending or substituted for those Acts shall as from the day on which this order is first publicly exhibited in the Consulate at Mombasa apply to the East Africa Protectorate.

“And I hereby further order that s. 331 of the Indian Succession Act (Act X of 1865), shall as from the said day apply to the East Africa Protectorate.

(Signed) SALISBURY.

Foreign Office,

September 30, 1898.

Published at Mombasa, November 4, 1898.

(Signed) Arthur H. Hardinge,

H.M.’s Commissioner and Consul-General.”

This is the Order referred to in the Schedule printed at p. XL and p. XLI of Vol. 1. of the Laws of Kenya.

It will be seen that at the same moment that s. 331 of the Indian Succession Act, 1865, was again applied to Kenya, the Hindu Wills Act, 1870, was also applied. If it is correct that the re-application to Kenya of s. 331 of the 1865 Act would have exempted the will of a Sikh made in Kenya from the provisions of s. 50 requiring attestation, that effect was simultaneously negated by the application to the Protectorate of the Hindu Wills Act, 1870, which applied s. 50. Mr. Khanna, however (if I understand him correctly) argued that the effect of the Secretary of State’s Order was that the application of the Hindu Wills Act, 1870, was limited (as in India) to wills made in the specified Indian Territories and wills made in East Africa affecting immovables in the specified Indian Territories. I am unable to believe that the Secretary of State’s Order was intended to have, or did have, such a limited application. The Order in Council applied to British subjects and foreigners and their property in the Protectorate. Why should the Secretary of State attempt to legislate in an Order made under an East African Order in Council for the handful of wills made in East Africa affecting immovable property in territories in India succession to which would in any event be governed by the law of its situation? Or can it be credibly supposed that the Secretary of State would make a special Order for East Africa to deal with the validity of wills made in Bengal, Madras or Bombay?

I think, that the effect of the Secretary of State’s Order was, on the one hand, to apply to wills of Hindus, Jainas, Sikhs and Buddhists in East Africa the rules for the execution, attestation, revocation, revival, interpretation and probate contained in those sections of the Indian Succession Act, 1865, which were enumerated in s. 2 of the Hindu Wills Act, 1870, while, on the other hand, exempting intestate or testamentary succession to the property of any Hindu, Mohamedan or Buddhist in East Africa (and wills made and intestacies occurring before January 1, 1866) from the other provisions of the 1865 Act. I think that the Order must be taken as substituting, for East African purposes, the territory comprising the East Africa Protectorate for the specified Indian Territories. In other words, the Secretary of State was, by his Order, applying to wills of Hindus, Jainas, Sikhs and Buddhists in East Africa the testamentary law which was applicable under the Hindu Wills Act, 1870 in the specified Indian Territories. Any other interpretation would lead to absurdity.

My conclusion is, therefore, the same as that reached by Cluer, J., in *In re Jethalal Govindji* (2) (1942), T.L.R. (R.) 732, though, with great respect to the reasoning of the learned judge in that case, I do not think that the question whether the Hindu Wills Act, 1870, applies in East Africa, depends upon domicile.

I would, therefore, decide propositions (2) and (3) above against the appellants and hold that attestation is necessary, in accordance with s. 50 of the Indian Succession Act, 1865, of the will of a Sikh made in Kenya affecting property situate in Kenya and that documents “B” and “D” are not wills. I

would also hold that s. 57 of the Indian Succession Act, 1865, applies to Kenya and that an informal intention by a Sikh in Kenya to revoke a will of property situate in Kenya is not good without more.

In accordance with the agreement arrived at between Counsel, that disposes of the appeal.

I would dismiss the appeal with costs.

It remains only to say that the copy of exhibit “B” contained in the supplementary record (though there is a more correct copy elsewhere) is not only extremely inaccurate in the body of it, but the testatum upon which the case largely depends is incorrectly copied, the word “Witness” and a cancelled signature being omitted. The copy of exhibit “C” (p. 8 of the record) lacks a copy of the signature of the testator and copies of the names of the witnesses. The advocate who signed the certificate that these documents were in accordance with the copies supplied by the Supreme Court signed a certificate which was not, I think, true and appears to have been careless. These certificates are signed far too light-heartedly. Subject to hearing argument, I would order that the advocates who prepared the record and supplementary record be disentitled from recovering costs from their clients in respect of the copies of documents “B” and “C”.

Crawshaw JA: I agree and have nothing to add.

Newbold JA: I also agree.

Appeal dismissed.

For the appellants:

DN Khanna & JK Winayak

The first respondent did not appear and was not represented. The second respondent in person.

For the third respondent:

JM Nazareth QC and GS Vohra

For the appellants:

Advocates: *Winayak, Johar & Co*, Nairobi

For the third respondent:

GS Vohra, Nairobi

Omparkash Gandhi v R
[1961] 1 EA 643 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	30 October 1961
Case Number:	1024/1961
Before:	Sir Ronald Sinclair CJ and Rudd J

[1] Evidence – Street traffic – Omnibus – Charge of carrying more passengers than permitted – Statutory exception – Owner not liable if offence committed without his knowledge – Precautions to be taken to prevent offence – Proof required to discharge onus upon owner – Traffic Ordinance, 1953, s. 97(2) (K.) – East African Customs (Management) Act, 1952, s. 167 (d) – Indian Evidence Act, 1872, s. 105.

Editor's Summary

The appellant was charged as owner of an omnibus with an offence under s. 97 (2) of the Traffic Ordinance, 1953, in that his vehicle carried more than the maximum number of passengers for which it was licensed. The appellant had employed a driver, a conductor and a turnboy who were in charge of the vehicle at the time of the incident. Two police constables who gave evidence for the prosecution stated that they had stopped the vehicle and found that it was carrying four passengers in excess of the permitted maximum. They said that as they were about to charge the conductor the appellant arrived and asked one of the constables to release the conductor and allow the vehicle to proceed since it was behind schedule, and that any charge to be preferred should be preferred against the appellant as owner. The case for the defence was that the vehicle stopped to pick up passengers and that after it had taken up sufficient passengers to make up the maximum, one other man forced his way on to the vehicle and refused and forcibly resisted when asked to leave by the conductor, that the conductor then reported the matter to the appellant who drove to the scene

and found the constables removing one person from the vehicle. The appellant gave evidence that he had instructed the driver and the conductor not to carry excess passengers and that checks were made from time to time by himself and his staff. The driver and the conductor confirmed that they had been so instructed by the appellant and there was no evidence to the contrary. The magistrate accepted the evidence of the constables, rejected that of the appellant and his three employees, and convicted the appellant of the offence charged. He found that the appellant had failed to establish on the balance of probability that he had taken any reasonable precautions to prevent a breach of the licence regarding the number of passengers the vehicle was licensed to carry; that the appellant and his employees had told a concerted but false story and that there was nothing in the evidence for the prosecution to indicate that the appellant had taken any such precaution. He further held that the appellant's readiness to be charged made it unlikely that he had taken any such precaution, and held that the onus was on the appellant to establish on the balance of the probabilities that he had taken such precautions. On appeal it was argued on behalf of the appellant that since it appeared that the offence had been committed without the knowledge of the appellant he was entitled to be acquitted if on the whole case there was a reasonable doubt whether he had taken all reasonable precautions to prevent the offence and that the onus of proving that he had not taken such reasonable precautions lay upon the prosecution.

Held –

- (i) the proviso to sub-s. 2 of s. 97 of the Traffic Ordinance is an exception or qualification to the law creating the offence stated in the earlier part of the sub-section, and the onus of proving circumstances entitling the appellant to the benefit of this proviso falls upon the appellant by virtue of s. 105 of the Indian Evidence Act.
- (ii) the onus of proof upon the appellant was not to establish that he had taken all reasonable precautions to avoid the commission of the offence, but to prove circumstances bringing the case within the proviso; the distinction was important since, if the appellant established certain circumstances which were capable of bringing the case within the proviso, then it was for the prosecution to show conclusively that such circumstances did not bring the case within the proviso.
- (iii) the section does not have the effect of raising a presumption in favour of the prosecution until the contrary is proved but has the effect of placing on the defence the onus of evidential proof and not of persuasive proof.
- (iv) the magistrate had misdirected himself when he held that it was for the appellant to establish on the balance of probability that he had taken all reasonable precautions to prevent the offence; the appellant had merely to prove the existence of circumstances which might amount to proof that he had taken all reasonable precautions and then it was for the prosecution to prove beyond doubt that any facts so proved did not establish that all reasonable precautions had been taken as well as to prove all the other essentials of the offence.
- (v) the appellant's request to the constable to release the conductor and to charge him instead, if anyone were to be charged, did not support the suggestion that the appellant had failed to take reasonable precautions against the commission of the offence.
- (vi) there was evidence from three witnesses that some precautions had been taken and this was not in any way contradicted nor were the witnesses broken down in this particular matter.

Appeal allowed. Conviction and sentence set aside.

[Editorial Note: In *R. v. Patterson*, [1962] 1 All E.R. 340, the Court of Criminal Appeal in England disapproved of *R. v. Ward*, [1915] 3 K.B. 696.]

Cases referred to:

- (1) *R. v. Sodeman*, [1936] 2 All E.R. 1138.
- (2) *R. v. Carr-Briant*, [1943] K.B.607.
- (3) *R. v. Dunbar*, [1957] 2 All E.R. 737.
- (4) *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462.
- (5) *R. v. Lobell*, [1957] 1 Q.B. 547; [1957] 1 All E.R. 734.
- (6) *R. v. Schama* (1914), 84 L.J.K.B. 396.
- (7) *Ali Ahmed Saleh Amgara v. R.*, [1959] E.A. 654 (C.A.).
- (8) *R. v. Naguib*, [1917] 1 K.B. 359.
- (9) *H.M. Advocate v. Braithwaite*, [1945] S.C. (J.) 55.
- (10) *R. v. Ward*, [1915] 3 K.B. 696.
- (11) *Mandan Devraj v. R.* (1955), 22 E.A.C.A. 488.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant appeals against conviction under s. 97 (2) of the Traffic Ordinance, 1953, which reads as follows:

“(2) If any public service vehicle carries more persons, baggage or goods than it is licensed to carry, the driver, conductor and the owner of such vehicle shall be guilty of an offence and shall be liable on conviction to a fine not exceeding shillings two thousand:

“Provided that the owner shall not be guilty as aforesaid if such offence is committed without his knowledge or consent and if he took all reasonable precautions to prevent it.”

It was proved that the appellant was the proprietor of a business called O.M.P. Road Services in Eldoret and as such he was the owner of a certain omnibus which was licensed as a public service vehicle to carry a maximum of twenty-eight passengers. He employed a driver, a conductor and a turnboy to operate this vehicle in accordance with his instructions and these three employees were in charge of the vehicle at the time of the incident which led to the prosecution of the appellant.

There was a conflict of evidence as to the facts of this incident between the evidence of the appellant and his three employees aforesaid and the evidence of two police constables who gave evidence for the prosecution. The magistrate accepted the evidence of the constables as being correct and completely rejected the evidence of the appellant and his three employees.

The constables testified that they had stopped the vehicle near Eldoret and found that it was carrying thirty-two passengers which was an excess of four passengers above the maximum permitted by the licence. They said that as they were about to charge the conductor the appellant drove up in his motor car and intervened in the matter, asking one of the constables to allow the vehicle to proceed since it was behind schedule, to release the conductor and suggesting that if a charge were to be preferred it should be preferred against the appellant as owner and not against the conductor. There was no suggestion,

however, in this evidence which could sustain a finding that the appellant admitted that the bus was carrying excess passengers.

The case for the defence was that the vehicle stopped to pick up passengers and that after it had taken up sufficient passengers to make up the maximum allowed by the licence, one other man forced his way onto the vehicle and refused and forcibly resisted when asked to leave by the conductor: that the conductor then went and reported the matter to the appellant who drove to the scene and found the constables removing one person from the vehicle. The magistrate appears to have thought that it was part of the defence case that the

constables had been called upon by the appellant's servant to remove a person who had boarded the vehicle when it was already full to the capacity allowed under the licence, but we can find no evidence to support this suggestion anywhere in the evidence. The appellant gave evidence on oath that he had instructed the driver and the conductor not to carry excess passengers and that checks were made from time to time by himself and his staff. The driver and conductor confirmed that they had been so instructed by the appellant and there was no evidence to the contrary.

As regards the conflict of evidence as to the facts of the actual incident, there is nothing on the record of the evidence itself which could enable this court to form an independent opinion one way or the other as to which side was telling the truth. The decision of the findings as to these facts depend entirely upon the credibility of the witnesses concerned. The magistrate accepted the evidence of the constables and rejected the evidence of the appellant and his three employees. We are unable to say that the finding as to the facts of the particular incident in question was not correct. There was ample evidence upon the record, if it was believed, to justify the findings on this aspect of the case. The magistrate further found that the circumstances were such that it was most unlikely that the appellant could have been aware of the fact that his vehicle was carrying more than the maximum number of passengers permitted by the licence, but he found that the appellant had failed to establish on the balance of probability that he had taken any reasonable precaution to prevent a breach of the licence with regard to the number of passengers the vehicle was licensed to carry.

This latter finding was based on the fact that the magistrate considered that the appellant and his employees had told a deliberate and concerted story regarding the facts of the incident which was false, and that in consequence of that they were unworthy of any credit and that there was nothing in the evidence for the prosecution to indicate that the appellant had taken any such precaution. He further considered that the appellant's readiness to be charged instead of his conductor made it unlikely that he had taken any such precaution. He directed himself that the onus was on the appellant to establish on the balance of the probabilities that he had taken such precautions.

In the course of the appeal it was argued on behalf of the appellant that he should have been found to be entitled to the benefit of the proviso to the subsection under which he was charged, and that the magistrate had placed too high an onus upon the appellant. The substance of this argument was that since it appeared that the offence had been committed without the knowledge of the appellant he was entitled to be acquitted if on the whole case there was a reasonable doubt as to whether he had taken all reasonable precautions to prevent the offence and that the overall onus of proving that he had not taken such reasonable precautions lay upon the prosecution.

Section 105 of the Indian Evidence Act, as amended by Ordinance No. 30 of 1936, provides as follows:

“105. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him;

“Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist; and

“Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

“(2) Nothing in this section shall:

- (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
- (b) impose on the prosecution the burden of proving that the circumstances or facts described in sub-s. (1) of this section do not exist; or
- (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”

The proviso to sub-s. 2 of s. 97 of the Traffic Ordinance is an exception or qualification to the law creating the offence as stated in the earlier part of the sub-section. The onus of proving circumstances entitling the appellant to the benefit of this proviso therefore falls upon the appellant by virtue of s. 105 of the Evidence Act, and the question involved in this part of the argument for the defence depends upon the degree of certainty which is required to discharge such an onus. That is to say, whether the proof required must be of such a nature and quality as to satisfy the court beyond reasonable doubt as is required in respect of matters which fall to be proved by the prosecution in a criminal case or is it to satisfy the court as regards the particular matter on the basis and to the extent of a balance of probability which is the ordinary onus upon a party in a civil case or, again, is it merely enough to raise a reasonable doubt as to the matter in question in the mind of the court or jury.

Where an onus of proof is placed upon the person accused of a criminal offence we doubt that proof beyond reasonable doubt is ever required of him. *R. v. Sodeman* (1), [1936] 2 All E.R. 1138; *R. v. Carr-Briant* (2), [1943] K.B. 607 and *R. v. Dunbar* (3), [1957] 2 All E.R. 737, all establish that such an onus is discharged by proof upon the basis of the balance of probability. This is sometimes called a burden of persuasive proof or a persuasive burden.

There are certain other types of cases in which it is sometimes said that there is an onus upon an accused person to give a reasonable explanation in respect of circumstances which have been established by the prosecution. In these cases the explanation need not be established as more than a reasonable possibility in the circumstances. Examples of this type of case are to be found in the doctrine of recent possession as applied to theft and receiving stolen property. Thus, if a person is found in possession of goods which have recently been stolen the court or jury is entitled but not bound to assume, in the absence of any explanation from the accused or to be found in the other circumstances of the case, that the accused either stole the property or received it knowing that it had been stolen. Another example occurs in homicide cases, where the Crown has proved facts which appear to amount to murder without any suggestion of the possibility of a defence such as self-defence, or accident, or a qualified defence such as provocation. If in such cases the accused wishes to raise such a defence he may be expected to give some explanation suggesting the particular defence to be raised and if he fails to give any explanation he may be convicted of murder. In all these cases the defence is never required to do more than show an explanation which is reasonably possible in the circumstances; such cases are not really cases of an onus or proof upon the defence in the persuasive sense for in truth in such cases the onus is upon the prosecution throughout to prove every essential of the offence beyond reasonable

doubt and it never shifts to the defence, but the prosecution may be established if the facts proved call for some explanation and no reasonable explanation is forthcoming. In all such cases if an explanation is given it must be completely rejected as a reasonable possibility or else the prosecution will fail, *Woolmington v. Director of Public Prosecutions* (4), [1935] A.C. 462, *R. v. Lobell* (5), [1957] 1 Q.B. 547 and *R. v. Schama* (6) (1914), 84 L.J. K.B. 396.

In *Ali Ahmed Saleh Amgara v. R.* (7), [1959] E.A. 654 (C.A.) the appellant appealed to the Court of Appeal from the dismissal by this court of his original appeal from a conviction of importing gold without a licence. He had been stopped or arrested at Mombasa as he was attempting to carry some of the gold through the customs gate. If the gold were in transit the importation would have been lawful and no licence would have been required.

Under s. 167, sub-s. (d) of the E.A. Customs Management Act, 1952, the onus of proving lawful importation of the gold was upon the appellant. This court had directed itself as follows:

“We recognise that this onus is not as heavy as the onus which lies upon the Crown in an ordinary criminal case, but nevertheless we consider that on the facts . . . there was evidence upon which the lower court was entitled to find that this onus had not been discharged.”

It was argued in the Court of Appeal for Eastern Africa that s. 105 of the Indian Evidence Act applied and that the onus upon the appellant under that Act and under the Customs Act was no more than to raise a reasonable doubt. The Court of Appeal held that s. 105 of the Evidence Act had no application to cases where there is a specific provision in another statute placing the burden of proof regarding a particular matter upon the person accused and that the English law on the point applied. It was stated in the judgment that even if by analogy the degree of the burden on the accused should be drawn from s. 105 of the Evidence Act, the court did not think that there was any material difference between that section and the English law on the point as stated in Phipson on Evidence (9th Edn.), at p. 38 as follows:

“When, however, the burden of an issue is upon the accused, he is not, in general, called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeed in proving a *prima facie* case, for then the burden is shifted to the prosecution, which has still to discharge its original onus which never shifts, i.e. that of establishing, on the whole case, guilt beyond a reasonable doubt.”

The court then referred to the following extract from the judgment in *R. v. Carr-Briant* (2):

“In our judgment in any case where, either by statute or common law, some matter is presumed against an accused person ‘unless the contrary is proved’ the jury should be directed that it is for them to decide whether the contrary is proved’ the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.”

The Court of Appeal then stated:

“We would respectfully agree with this view, and on this basis, we do not think that the learned judges’ direction to themselves as to the matter which the appellant is required, by s. 167 of the Customs Act to establish can be said to be wrong. It still of course, remains for the court to be satisfied beyond a reasonable doubt as to the guilt of the accused on the

whole of the evidence and this, in substance, is all that is enacted by the second proviso to s. 105 . . .”

The quotation from Phipson purports to state a general rule and reference to that work will show that the author or editor considered that there may be some exceptions. If there are any exceptions to the rule that in a prosecution for a criminal offence the person accused is never required to discharge any onus of proof that may be upon him to any higher degree of proof than to establish the matter in question on the basis of the balance of probability, we think that they are very rare indeed. In *R. v. Naguib* (8), [1917] 1 K.B.359, on a prosecution for bigamy it was held that strict proof was required of the validity of a former foreign marriage. The decision in that case really turned upon whether the evidence was capable of establishing the point and it was held that the evidence of the accused who was not qualified to express an opinion on the legality of the alleged former foreign marriage was incapable of proving its validity.

Nevertheless it is undoubtedly true in general that an accused person in a criminal prosecution is never required to prove any matter to any greater degree of certainty beyond establishing it to the extent of a balance of probability in its favour. We think it was in that sense that the expression “proving a *prima facie* case” should be understood in the quotation from Phipson which was approved in *Amgara’s* case (7), for the judgment in *R. v. Dunbar* (3), shows that in the case of a defence of diminished responsibility in England the onus of proof on this issue does not shift to the prosecution and the accused must discharge it to the extent of showing a balance of probability in its favour on all the material adduced in evidence in the trial. It is well settled that a similar degree of proof is required to establish the special defence of insanity: *R. v. Sodeman* (1). In *Carr-Briant’s* case (2), circumstances were proved which raised a statutory presumption of corruption until the contrary was proved and the degree of proof to the contrary required was proof to the extent of showing a balance of probability and not necessarily proof beyond reasonable doubt.

The dictum from the judgment in *Carr-Briant’s* case (2), which was approved in the judgment in *Amgara’s* case (7), is expressly confined to cases in which some matter is presumed against a person accused until the contrary is proved, such as some cases of corruption and the special defence of insanity and in England diminished responsibility. In such cases the onus upon the accused person is a persuasive onus which must be established to the extent of showing a balance of probability.

When it is said that in such cases it still remains for the court to be satisfied beyond a reasonable doubt as to the guilt of the accused on the whole of the evidence, it is not intended that the prosecution must fail unless it is able to rebut beyond all doubt any *prima facie* proof to the contrary of the presumption in favour of the Crown which may have been adduced by the defence. Such a meaning conflicts with the direction in *H.M. Advocate v. Braithwaite* (9), [1945] S.C. (J.) 55 at p. 58, which was approved in *R. v. Dunbar* (3):

“If you think the balance of probability to be in favour of the defence, you must sustain it, and your verdict will be culpable homicide. If, on the other hand, doing your duty fearlessly and honestly to the best of your ability, you cannot find in the evidence laid before you material to justify the conclusion that the balance of probability is in favour of this defence, then I have to tell you that it is your duty to return a verdict of murder.”

But this rule only applies to cases in which a presumption has arisen in favour of the prosecution until the contrary has been proved and even where the rule applies, it is for the prosecution to discharge its full burden of proof in all other respects including the facts which establish the presumption in its favour.

This rule as stated in *Dunbar* (3), obviously does not apply where the onus upon the defence is merely an evidential and not a persuasive onus of proof.

In all criminal cases in which there is any onus of proof upon the defence it is necessary to ascertain the precise nature and extent of that onus. In *R. v. Ward* (10), [1915] 3 K.B. 696, there was an onus of proof upon the prisoner to show a lawful excuse for the possession at night of alleged instruments of housebreaking. He proved conclusively that he was a bricklayer and that the alleged instruments of housebreaking were ordinary tools of his trade. It was held that he had discharged the onus which was upon him and that thereafter the Crown had to prove that he was in possession of the alleged instruments at the time and place in question for purposes of housebreaking. This case is not, in our opinion, an authority showing the degree of certainty to which facts capable of discharging the onus must be established. It is rather an authority showing, as regards the particular offence, one instance of a set of facts which will discharge that onus and which will have the effect of requiring the prosecution to establish the whole issue by proof beyond reasonable doubt.

Now the onus which is placed upon the defence by s. 105 of the Indian Evidence Act is to prove two types of facts. The first type of facts are circumstances bringing the case within any exception, exemption from or qualification to the operation of the law creating the offence. The second type of facts are those which are especially within the knowledge of the person accused. Difficulties sometimes arise as to facts especially within the knowledge of the person accused as to whether they have to be proved or negatived by the prosecution as part of the general issue or whether they have to be proved by the defence as facts specially within the accused's own knowledge. Fortunately no such difficulty arises in this appeal since it is clear that to avoid conviction the appellant had to obtain the benefit of the proviso to s. 97, sub-s. (2), of the Traffic Ordinance, 1953, by showing that the offence was committed without his knowledge or consent and that he had taken all reasonable precautions to avoid it. The issue which was really in question was whether he had taken all reasonable precautions to avoid the commission of the offence. The onus of proof upon the appellant, however, was not to establish that he had taken all reasonable precautions to avoid the commission of the offence, it was to prove circumstances bringing the case within that exception. The distinction is perhaps a fine one, but we think it is important since, in our opinion, if the accused establishes certain circumstances which he suggests are capable of bringing the case within the proviso, then it is for the prosecution to show conclusively that such circumstances do not bring the case within the proviso. We think it follows that the section does not have the effect of raising a presumption in favour of the prosecution until the contrary is proved in the sense of the presumptions involved in the cases of *Sodeman* (1), *Carr-Briant* (2), and *Dunbar* (3). It, therefore, follows, in our opinion, that the onus on the defence is an onus of evidential proof and not an onus of persuasive proof. This appears to be confirmed by the second proviso to sub-s. (1) and by the exclusion from the scope of the section of the special defence of insanity in which persuasive proof is required. In our opinion the effect of s. 105 in the present appeal was that it was for the appellant to show from the evidence adduced by the defence or by the prosecution that there was evidential material capable of being believed and capable of bringing the case within the proviso to s. 97, sub-s. (2), of the Traffic Ordinance, 1953. It was then for the court to decide if that evidential material sufficed to bring the case within the proviso and if there was any doubt as to that or as to any other material ingredient of the offence the appellant was entitled to be acquitted in accordance with the second proviso to sub-s. (1) of s. 105 of the Act: *Mandan Devraj v. R.* (11) (1955), 22 E.A.C.A. 488 at 493.

It is clear that the magistrate misdirected himself when he held that it was for the appellant to establish on the balance of probability that he had taken all reasonable precautions to prevent the offence; the appellant had merely to prove the existence of circumstances which might amount to proof that he had taken all reasonable precautions and then it was for the prosecution to prove beyond doubt that any facts so proved did not establish that all reasonable precautions had been taken as well as to prove all the other essentials of the offence.

If the magistrate's finding that the appellant had failed to take any reasonable precautions could be justified the misdirection as to the onus of proof would not have been material, since the magistrate appears not to have believed the evidence of the appellant and of his servants to the effect that proper instructions were given in the matter and that occasional checks were made. However, we are not satisfied that this finding was justified. In the circumstances of the case we are not satisfied with the reasons stated by the magistrate. It was not to be expected that the prosecution either could or would prove whether or not instructions in relation to the matter had been given or that checks were or were not made, and the appellant could not be blamed for the fact that the prosecution did not give such evidence. It does not necessarily follow from the fact that the appellant and his servants gave evidence which was false regarding the actual facts of the particular incident that their evidence as to instructions and checks was equally false. We do not consider that in the circumstances proved the appellant's request to the constable to release the conductor and to charge the appellant instead, if anyone were to be charged, supports the suggestion that the appellant had failed to take reasonable precautions against the commission of the offence. There was evidence from three witnesses that some precautions had been taken. This evidence was not in any way contradicted nor were the witnesses broken down in respect of this particular matter. There was no evidence of frequent or systematic contravention of the section. It was found as a fact that the appellant had no knowledge of the offence.

In our opinion if these matters had been better considered and given their due weight and if the magistrate had not misdirected himself as to the onus upon the appellant under s. 105 of the Evidence Act we think that the trial might well have resulted in the acquittal of the appellant. For these reasons we allow the appeal, set aside the conviction and sentence and acquit the appellant.

Appeal allowed. Conviction and sentence set aside.

For the appellant:

SR Gautama

For the respondent:

C Njonjo (Acting Senior Crown Counsel)

For the appellant:

Advocates: *SR Gautama*, Nairobi

For the respondent:

The Attorney-General, Kenya

[1961] 1 EA 652 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 21 November 1961
Case Number: 97/1960
Before: Sir Kenneth O'Connor P, Crawshaw and Newbold JJA
Appeal from: H.M. Supreme Court of Kenya—MacDuff, J

[1] Immigration – Child – Adopted child – Lawful adoption under Hindu law – Entry permit sought for “my son” – Adoption not disclosed – Entry of child permitted – Removal order made – Burden of proof that child lawfully in territory – No misrepresentation by child – Meaning of “child” – Immigration Ordinance, 1956, s. 7(1), s. 8, s. 11, s. 18 (2), s. 19 (K.) – Immigration (Control) Ordinance, 1948, (Cap. 51), s. 5 (1) (i), s. 6, s. 7(1), s. 8 (K.) – Defence (Admission of Women and Children) Regulations, 1940, Reg. 3 – Immigration (Control) (Exemption) Regulations, 1948, Reg. 3 (d) (K.) – Interpretation and General Provisions Ordinance, 1956, s. 3 (1) (K.) – Immigration Restriction Ordinance (Cap. 62), (K.) – Deportation (Immigrant British Subjects) Ordinance, 1949, s. 2 (2) (K.) – Adoption of Children Ordinance (Cap. 21), s. 7 (1) (K.) – Indian Evidence Act, 1872, s. 114 – Poor Removal Act, 1846, s. 1.

Editor’s Summary

In 1940 the respondent was lawfully adopted in India under Hindu law by his uncle. In August, 1947, the adoptive father who was a resident of Kenya applied for an entry permit for the respondent who was described in the letter of application as “my son”. The immigration officer, Nairobi, replied that there would be no objection under the Defence (Admission of Women and Children) Regulations to the entry of the applicant’s

“son, Mr. Shivji Naran provided that he is under eighteen years of age and complies with the provisions of the Immigration Restriction Ordinance and its amendments”.

The respondent obtained an Indian passport in which his adoptive father’s name was shown as being his father, and he arrived at Mombasa and entered the Colony in September, 1948. He then filled in the statutory form of particulars and produced the letter of authority from the immigration officer, Nairobi. Under the authority of that letter he was permitted to enter but no permit or pass was ever issued to him under either the Immigration (Control) Ordinance, 1948, or the Immigration Control Regulations, 1948. In 1959 the respondent was served with a removal order under s. 11 of the Immigration Ordinance, 1956, whereupon the respondent filed a suit in the Supreme Court claiming a declaration that the removal order was unlawful and a nullity. The appellant denied that the respondent had been lawfully in Kenya since 1948 on the ground that his original permission to enter was obtained by a false representation that he was the son of his uncle and adoptive father. The appellant also claimed that the respondent had not entered Kenya pursuant to a valid entry permit as required by s. 6 of the Immigration (Control) Ordinance, 1948. The trial judge held that the burden of proving his entry was lawful rested on the respondent and that having proved that he was granted permission to enter the Colony, the provisional presumption arose that such entry was lawful and that the burden then passed to the Crown to prove that permission to enter was given by a misrepresentation which under s. 8 of the Ordinance made the permission void. He also held that, since the Defence (Admission of Women and Children) Regulations,

1940, had ceased to have effect at the time the respondent was

allowed to enter, and since there was no evidence that the respondent misled the immigration officer or that the officer was misled the onus on the appellant had not been discharged. He accordingly held the removal order to be unlawful. On appeal.

Held – (Per Sir Kenneth O'Connor, P., and Crawshaw, J.A.; Newbold, J.A., dissenting):

- (i) where it is proved that there has been a prior material misrepresentation to the Immigration Department, not even the provisional burden of proof is shifted by the immigrant showing that he has been permitted to enter the Colony; the burden of proof that the immigrant is not, or was not when he entered, a prohibited immigrant or that his entry, presence or residence is or was lawful is and remains upon the immigrant in accordance with s. 18 (2) of the Immigration Ordinance, 1956. *Attorney-General v. Govindji Shah*, [1961] E.A. 110 (C.A.) followed.
- (ii) to state (with a view to gaining permission to enter the Colony under Category C of the Schedule to Defence (Admission of Women and Children) Regulations, 1940), that a child is the son of the applicant when he is not a natural but an adopted son, and not to disclose the adoption is a “misrepresentation” and a “non-disclosure” of a material circumstance within s. 8 of the Immigration Ordinance, 1956.
- (iii) (Per Crawshaw, J.A.): the word “children” in a statute *prima facie* means natural children and before extending the meaning in the immigration laws to include adopted children it would be necessary to consider whether the apparent objects of the legislation would be better served by so doing.

Appeal allowed.

Cases referred to:

- (1) *Keshavlal Punja Parbat Shah v. Superintendent of H.M. Prison*, Nairobi (1955), 22 E.A.C.A. 218.
- (2) *Attorney-General v. Govindji H. N. Shah*, [1961] E.A. 110 (C.A.).
- (3) *Bhimji Meghji Shah v. Attorney-General*, E.A.C.A., Civil Appeal No. 6 of 1961 (unreported).
- (4) *Motilal Hansraj Rajshi Dodhia v. Attorney-General*, Kenya Supreme Court Civil Case No. 1417 of 1957 (unreported).
- (5) *Chimanlal Motibhai Hira Patel v. The Attorney-General*, [1960] E.A. 388 (C.A.).
- (6) *Guardians of Woolwich Union v. Guardians of Fulham*, [1906] 2 K.B. 240.
- (7) *Re Fletcher deceased, Barclays Bank Ltd. v. Ewing*, [1949] 1 All E.R. 732.
- (8) *Ex parte Bhagubhai Bhanabhai* (1954), 27 K.L.R. 134.
- (9) *Viscountess Rhondda's Claim*, [1922] 2 A.C. 339.
- (10) *Hirji Devchand Ramji v. Attorney-General* (1956), 23 E.A.C.A. 20.

November 21. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: The respondent, a Hindu British subject residing in Nairobi, was served with a removal order made by the Chief Secretary of Kenya under s. 11 of the Immigration Ordinance, 1956 (hereinafter called "the 1956 Ordinance"). The respondent then filed a suit in the Supreme Court of Kenya against the Attorney-General (the appellant) in which he claimed a declaration that the removal order was unlawful and a nullity. In his plaint the respondent alleged *inter alia* that he had been lawfully resident in the Colony since 1948 and that he was entitled on application to be granted a resident's certificate under the 1956 Ordinance. The appellant denied that the respondent had been lawfully resident in the Colony since 1948 for the reason

that his original permission to enter the Colony was obtained by a false representation that he was the son of Naran Punja. The appellant further alleged that the respondent had not entered the Colony pursuant to a valid entry permit as required by s. 6 of the Immigration (Control) Ordinance (Cap. 51 of the Laws of Kenya hereinafter called “the 1948 Ordinance”).

There is no substantial dispute as to the facts. The respondent is the natural son of one Jina Punja. In or about 1940, Naran Punja, who was his uncle and then childless, adopted the respondent in India. It is not disputed that the adoption was lawful under Hindu law and it was properly proved in the suit. On August 23, 1947, Naran Punja (the adoptive father) who was then in Kenya applied by letter to the immigration officer, Nairobi

“to insert my son’s name in my present passport or if it is not possible to insert the name please issue an entry permit to him. His name is Shivji Naran and 14 years.”

The numbers of the applicant’s personal tax receipts for 1944, 1945 and 1947 were quoted, presumably to show that he was a person normally resident in the Colony. To this letter the immigration officer replied on October 15, 1947, acknowledging receipt of Naran Punja’s letter and informing him that there would be no objection under the Defence (Admission of Women and Children) Regulations, 1940, to the

“entry into the Colony and Protectorate of Kenya of your son Mr. Shivji Naran, provided that he is under eighteen years of age and complies with the provisions of the Immigration Restriction Ordinance and its amendments.”

This letter will be referred to hereinafter as “the letter of authority” and the above-mentioned Regulations will be referred to as “the 1940 Regulations”.

The respondent obtained an Indian passport, in which his father’s name was shown as Naran Punja, and arrived at Mombasa and entered the Colony on September 15, 1948. He was interviewed by immigration officials, filled in the form of immigration particulars required under the provisions of the Immigration Restriction Ordinance (Cap. 62) then in force, and by the Statistics Ordinance. It appears that he handed or showed to the immigration officer the letter of authority, as his immigration form bears noted upon it the same immigration office reference number as the letter of authority. Mr. Pearce, the acting deputy principal immigration officer, who gave evidence was able to state definitely that the respondent was permitted to enter the Colony under the letter of authority (which fact seems also to have been agreed by counsel in the court below) and that no permit or pass was ever issued to him under the 1948 Ordinance or under the Immigration Control Regulations, 1948. This evidence was not challenged in cross-examination. The position when the respondent entered Kenya was that the 1940 Regulations (under which the letter of authority had been issued) had been revoked, the Immigration Restriction Ordinance had been repealed, and the 1948 Ordinance and Regulations had been brought into force.

The 1940 Regulations prohibited the entry into Kenya of children under eighteen years of age, subject to a proviso that if the immigration officer was satisfied that any person came within any of the categories specified in the Schedule and was not a prohibited immigrant, he might permit such person to enter the Colony. It has been held by this court that such permission, if not conditional, need not be in writing: *Keshavlal Punja Parbat Shah v. Superintendent of H.M. Prison, Nairobi* (1) (1955), 22 E.A.C.A. 218. One of the categories in the Schedule was:

“(c) the children who have not attained the age of eighteen years of any person who is normally resident or employed in the Colony.”

Section 6 (1) of the 1948 Ordinance provided *inter alia* that no person to whom that section applied (which would include the respondent) should enter the Colony unless he was in possession of a valid entry permit issued to him under the provisions of sub-s. (1) of s. 7 of that Ordinance or his name was endorsed on a valid entry permit in accordance with the provisions of s. 8 of that Ordinance, or unless he was in possession of a valid pass issued to him under regulations made under that Ordinance. None of the classes in sub-s. (1) of s. 7 would have applied to the respondent (a child of fifteen) so that he could not have got an entry permit under that sub-section, and there is no evidence that his name was endorsed on an entry permit under s. 8. The evidence of Mr. Pearce, unchallenged in cross-examination, established that no entry permit or pass was in fact issued to the respondent under the 1948 Ordinance or the 1948 Immigration Control Regulations made under it which had then been brought into force. It is clear that the respondent got in by virtue of the letter of authority, apparently because it was decided to honour that authority notwithstanding revocation of the 1940 Regulations. The only other possibility would be that the respondent got in under reg. 3 (d) of the Immigration (Control) (Exemption) Regulations of 1948. That Regulation exempts from the operation of the 1948 Ordinance any person who satisfies the principal immigration officer that he is a child of a permanent resident of the Colony. Even if the respondent entered by virtue of that Regulation, he could only do so if the principal immigration officer was satisfied that he was a “child” of a permanent resident. In either case, the principal immigration officer appears to have been so satisfied because of the representation by Naran Punja that the respondent was Naran Punja’s son, when in fact he was his adopted son.

The 1948 Ordinance was repealed by the 1956 Ordinance of which s. 8 reads as follows:

- “8. Any entry permit, pass, certificate or other authority, whether issued, granted or conferred under this Ordinance or under any regulations made thereunder or under any other law for the time being in force, whether or not since repealed, which is or was obtained by, or is or was issued, granted or conferred as a result or by reason of, fraud, or misrepresentation or concealment or non-disclosure, whether intentional or inadvertent, of any material fact or circumstance, shall be and be deemed always to have been null, void and of no effect.”

This court has recently held in two cases viz: *Attorney-General v. Govindji H. N. Shah* (2), [1961] E.A. 110 (C.A.), and *Bhimji Meghji Shah v. Attorney-General* (3), E.A.C.A. Civil Appeal No. 6 of 1961 (unreported) that the words “or other authority” include an immigration officer’s oral permission to enter the Colony under reg. 3 of the 1940 Regulations. By parity of reasoning, I have no doubt that these words also include an immigration officer’s oral permission to enter the Colony under reg. 3 (d) of the Immigration (Control) (Exemption) Regulations of 1948.

Section 18 (2) of the 1956 Ordinance reads:

- “(2) The burden of proof that any person is not or was not, at any time before or after the commencement of this Ordinance, a prohibited immigrant or that the entry, presence or residence in the Colony of any person is or was at any such time lawful, shall lie on that person.”

The learned judge in the present case adjudged the removal order to be unlawful. He held (following *Motilal Hansraj Rajshi Dodhia v. Attorney-General* (4), Kenya Supreme Court Civil Case No. 1417 of 1957) (unreported), that the legal burden of proving that his entry was lawful rested throughout on the plaintiff (respondent) by virtue of s. 18 (2) of the Ordinance, but that he

went some way to discharge this when he called evidence to show that on his arrival he was granted permission to land by the immigration officer, that having done that, a provisional presumption arose that the plaintiff's entry was lawful, and the provisional burden—a burden raised by the state of the evidence—was then shifted to the Crown to prove that the immigration officer was satisfied as a result of a misrepresentation and that the permission was accordingly void by virtue of s. 8 of the Ordinance. The learned trial judge continued:

“In the present case the facts show that the plaintiff appeared before an immigration official, that he filled in a form of ‘immigration particulars’, that his passport was stamped and in the result he was allowed to enter the Colony. It must be presumed that he was in possession of a valid entry permit or pass under the terms of the Immigration (Control) Ordinance (Cap. 51). In the alternative it must be presumed that the immigration officer was satisfied that the plaintiff came within the terms of s. 7 or s. 8 of that Ordinance and permitted the plaintiff to enter the Colony. I am satisfied that once it is established that the plaintiff duly reported to the immigration officer and was permitted by him to enter the Colony under the Immigration (Control) Ordinance (Cap. 51) the onus upon the plaintiff of proving that he is not a prohibited immigrant has been *prima facie* discharged and that thereafter the onus of establishing that the case comes within the provisions of s. 8 of the Immigration Ordinance, No. 35 of 1956, lies on the person who asserts that to be so, at least to the extent of raising a *prima facie* case.”

The learned judge then set out s. 8 of the 1956 Ordinance and continued:

“The misrepresentation relied on by the defendant is that the plaintiff was described as the son of Naran Punja which has been held to mean the natural son, whereas in fact he was the adopted son of Naran Punja. In view of the fact that the Defence (Admission of Women and Children) Regulations, 1940, had ceased to be of effect at the time of the plaintiff being permitted to enter the Colony, that there is no evidence that he himself misled the immigration officer who permitted his entry, and that there is no evidence that the immigration officer himself was misled I would take the view that the onus lying on the defendant has not been sufficiently discharged.”

With respect, I do not think that the learned judge was correct.

First, as to the burden of proof:

This court has dealt with this in two recent cases—neither of which seems to have been cited to the learned judge—*Chimanlal Motibhai Hira Patel v. The Attorney-General* (5), [1960] E.A. 388 (C.A.), and *Attorney-General v. Govindji H. N. Shah* (2).

An extract from the leading judgment in *Govindji's* case (2), with which the other members of the court agreed, is as follows:

“The learned judge [that is to say the trial judge in *Govindji's* case] said:

“ ‘I am satisfied that once it is established or admitted that the plaintiff duly reported to the immigration officer and was permitted by him to enter the Colony under the Defence (Admission of Women and Children) Regulations, 1940, the onus upon the plaintiff of proving that he is not a prohibited immigrant has been *prima facie* discharged and that thereafter the onus of establishing that the case comes within the provisions of s. 8 of the Immigration Ordinance lies upon the person who asserts that this is so, at least to the extent of raising a *prima facie* case’.”

This is the same argument which found favour with the learned judge in the present case.

The judgment in this court in *Govindji's* case (2), continues:

“That may well be correct in a case where no misrepresentation has been proved to have been made: *Bhanabhai's* case. It is correct that, in such a case, the provisional burden of proof depending on the state of the evidence, which Lord Denning, in *Huyton-with-Roby U.D.C. v. Hunter*, [1955] 2 All E.R. 398; and *Dunn v. Dunn*, [1948] 2 All E.R. 822, distinguished from the legal burden of proof, is shifted by showing that the immigration officer at the port of entry was satisfied that the immigrant's entry was lawful. That would not shift the legal burden of proving that the immigrant was not a prohibited immigrant at the time of first entry which, under s. 18 (2) of the Ordinance remains upon the immigrant and does not shift, so that at the end of the case it would be the duty of the judge to ask himself: ‘Has that burden been discharged?’: *Dunn v. Dunn* (supra). In *Bhanabhai's* case, it was held that it had been discharged. But, where it is proved that there has been a prior material misrepresentation to the Immigration Department (whether to the head office or to the immigration officer at the port of entry), not even the provisional burden of proof is shifted; the burden of proof that the immigrant is not, or was not when he entered, a prohibited immigrant and that his entry and presence in the Colony was and is lawful, rests squarely upon the immigrant under s. 18 (2) of the Ordinance: *Ramji's* case and *Chimanlal's* case (supra).”

That passage is binding on this court and upon courts below and I would repeat that where it is proved that there has been a prior material misrepresentation to the Immigration Department, not even the provisional burden of proof is shifted by the immigrant showing that he has been permitted to enter the Colony: the burden of proof that the immigrant is not, or was not when he entered, a prohibited immigrant or that the entry, presence or residence in the Colony of the immigrant is or was lawful is and remains upon the immigrant (s. 18 (2) of the 1956 Ordinance).

I think, with the greatest respect, that the learned judge was also wrong in saying that it must be presumed that the respondent was in possession of a valid entry permit or pass under the terms of the 1948 Ordinance or that, in the alternative, it must be presumed that the immigration officer was satisfied that the respondent came within the terms of s. 7 or s. 8 of that Ordinance. As to the suggested presumption that the respondent was in possession of an entry permit or pass, the evidence of Mr. Pearce and the agreement of counsel established that no permit or pass was in fact issued to the respondent under the 1948 Ordinance or the 1948 Regulations. There was, therefore, no room for such a presumption. It is true that the respondent said that he had had an entry permit under the Immigration Control Ordinance; but his subsequent answers showed that he could not remember what it was like and may have been confusing the letter of authority with an entry permit. Mr. Pearce was quite definite that no permit or pass had been issued. As to the suggested presumption that the respondent satisfied the immigration officer that he came within the terms of s. 7, it is obvious that he, a child of fifteen, could not have fallen within (or have satisfied the immigration officer that he fell within) any of the classes mentioned in that section. As to s. 8, there was no entry permit on which his name was endorsed and it was not endorsed on his passport which was exhibited. The Immigration (Control) Regulations (unlike the 1940 Regulations) require written applications to be made by immigrants in the prescribed forms leading to the issue of written certificates or passes and there were none such. The respondent's counsel agreed that the respondent got in under the letter of authority. It must be taken that that was what happened. This is not a question

of an appellate court upsetting a finding of fact. There is no finding of fact on this point: the learned judge merely sought to found a presumption on the facts that the respondent appeared before the immigration officials and was admitted. But (as already stated) Mr. Pearce's unchallenged evidence and counsel's agreement and an examination of the 1948 Ordinance and Regulations leave no room for such a presumption. It was established that the respondent got in under the letter of authority. It may be that the authorities considered that that gave him a vested right to enter, or that it entitled him to enter under the Immigration (Control) (Exemption) Regulations; or it may be that he was simply allowed in as an administrative act to honour a permission already given.

Mr. Havers, for the appellant, argued that the respondent was rightly admitted under the letter of authority, notwithstanding that the 1940 Regulations had been revoked by the time he arrived. He contended that the letter of authority would have conferred on the respondent a right or privilege which he would not lose by the revocation of the 1940 Regulations. Mr. Havers relied on, *inter alia*, s. 13 (3) (c) of the Interpretation and General Clauses Ordinance (Cap. 1 of the Laws of Kenya). He argued that it would be intolerable that a permission to enter granted under the 1940 Regulations on which an immigrant had come from India should not be honoured because, before his arrival, the Regulations had been revoked. Whether the permission to enter had a legal basis in the letter of authority as Mr. Havers contended, or whether the respondent was admitted under the Immigration (Control) (Exemption) Regulations, or merely by an administrative act to avoid injustice does not greatly matter if the authority to enter was obtained by a

“misrepresentation or concealment or non-disclosure whether intentional or inadvertent”:

(Section 8 of the 1956 Ordinance). If the letter of authority was an effective authority so obtained, it would be avoided if it fell within s. 8 of the 1956 Ordinance. If it was ineffective as an authority to enter by reason of the prior revocation of the 1940 Regulations, then the respondent entered illegally (s. 6 of the 1948 Ordinance) since he was not in possession of a valid entry permit or pass under s. 7 or s. 8 of the Ordinance, unless he was exempted from the provisions of that Ordinance by reg. 3 (d) of the Immigration (Control) (Exemption) Regulations. Such an exemption would also be avoided by s. 8 of the 1956 Ordinance if the principal immigration officer was satisfied that the respondent was the “child” of a permanent resident as a result of a

“misrepresentation or concealment or non-disclosure, whether intentional or inadvertent of any material fact or circumstance”.

It is, therefore, necessary to consider whether or not Naran Punja's letter of August 23, 1947, asking for the insertion of his “son's” name in his passport or for the issue of an entry permit to him, was a misrepresentation within the meaning of s. 8 or whether the failure to disclose that the respondent was not a natural, but merely an adopted, son was a non-disclosure of a material fact or circumstance.

Clearly, since the 1940 Regulations prohibited the entry into the Colony of children under eighteen years of age subject to a proviso in favour of children under eighteen of persons normally resident or employed in the Colony, a representation by Naran Punja that the respondent was his son would be very material. Upon that relationship would rest the respondent's only title to enter. Mr. Nazareth, for the respondent, contended that since an adopted son in Hindu law is, in almost all respects, equivalent to a natural son (Gupte's Hindu Law, Articles 262 and 263), it was not a misrepresentation for Naran Punja to refer to the respondent as his son. Mr. Nazareth argued that while

“children” in a statute *prima facie* means natural children that is only the *prima facie* meaning and the meaning may be extended to include adopted children if the object of the statute is thereby served. I agree with this proposition of law; but would add that in order to justify an extension of the *prima facie* meaning, it must be reasonably plain that the object of the enactment would thereby be served.

In *Guardians of Woolwich Union v. Guardians of Fulham* (6), [1906] 2 K.B. 240, the question was whether the proviso to s. 1 of the Poor Removal Act, 1846, applied to illegitimate as well as legitimate children. Vaughan Williams, L.J., said at p. 246:

“... he [counsel] argued that the proviso to the section did not apply in the case of an illegitimate child. He relied for the purpose of that argument upon the technical rule of law that the word ‘child’ or ‘children’ means a legitimate child or legitimate children, and that meaning must *prima facie* be given to the word whenever it occurs in a statute. It is of course true that that is only *prima facie* the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute. Although that is so, I cannot say that, in the case of the enactment in question, I find any object plainly aimed at which would make it more consonant with the scope of the Act that we should depart from what is *prima facie* the meaning of the word and construe it as including illegitimate children.”

Stirling, L.J., said at p. 255:

“... I cannot find any satisfactory reason for departing from that which is the *prima facie* meaning of the word ‘child’ when used in a statute.”

Fletcher Moulton, L.J., said at p. 259:

“For the reasons given by my brother Lords Justices I am satisfied that the word ‘children’ in the proviso, whether in its original form or as amended, refers only to legitimate children. I have not been able to find in the statutes relating to the poor law any case in which the word ‘child’ is used in relation to illegitimate as well as legitimate children without the legislature having used express words to render their meaning in this respect perfectly clear. Therefore it seems to me that the legislature in framing these statutes intentionally acted on the view that the word ‘child’, used alone, would, according to its ordinary meaning, signify a legitimate child. It follows, therefore, that these paupers, being illegitimate, are not within the proviso, and that this contention of the respondents fails.”

It seems that the same principle applies as regards an adopted child, certainly in the case of a will. *Re Fletcher deceased, Barclays Bank Ltd. v. Ewing* (7), [1949] 1 All E.R. 732 at pp. 735, 736.

Mr. Nazareth went on to submit that the object of the 1940 Regulations would be served by extending the meaning of “children” in item (c) of the Schedule to include adopted children in the case of Hindus only, and he argued that this would be more consonant with the object of the Regulations than to give “children” its ordinary meaning—that is legitimate issue of the first generation.

From an examination of the 1940 Regulations it seems that their object was to curb the inflow of women and children under eighteen (useless non-combatants) into Kenya in time of war. The Regulations absolutely prohibited the entry of women and children under eighteen except those who satisfied an immigration officer that they came within any of the scheduled categories. Those categories consisted of members of the forces of the Crown, nurses, women over eighteen who were normally resident or employed in the

Colony, and the wives and children over eighteen of persons normally resident or employed in the Colony. (A discretion was reserved to the Governor to admit other women and children.) There is no indication whatever that the object of the Regulations would be served by extending the *prima facie* meaning of “children” to include Hindu adopted children. As already stated, the Regulations were promulgated in war time, and they were enacted, not by the Legislative Council, but by the Governor as Defence Regulations. If the subsequent course of conduct of the Government were any indication of the Governor’s intentions in making the Regulation, then it would be reasonably clear that the Government did not intend the exemption of “children” of a permanent resident to include adopted children. The Government has, in a series of cases, made deportation or removal orders against persons who entered the Colony under the 1940 Regulations on representations that they were children of residents, when it was later discovered that they were, or were alleged to be, adopted children only. However, I do not think that that is an admissible consideration from which to infer the intention of the enacting authority when the 1940 Regulations were made. I prefer to rest my conclusion on the Regulations themselves. I do not find in the 1940 Regulations any “object plainly aimed at” (in the words of Fletcher Moulton, L.J., in the *Woolwich Guardians* case (6), which would make it consonant with the object of the Regulations that one should depart from the *prima facie* meaning of “children” and construe it as “adopted children”. The courts in Kenya and this court have consistently taken this view, though in several of the cases their expressions of opinion have been obiter and have not been an essential part of the ratio decidendi because in those cases a valid adoption was not proved.

In *Ex parte Bhagubhai Bhanabhai* (8) (1954), 27 K.L.R. 134, the divisional court said at p. 136:

“It is not necessary for us to decide whether there was a valid adoption of the applicant by Somabhai or whether such an adoption would be recognized by the Kenya courts because, even if the applicant is an adopted son of Somabhai, we are not prepared to hold that ‘children’ in item (c) of the Schedule of the 1940 Regulations includes adopted children. The word ‘child’ in an Act of Parliament (and presumably in a statutory rule) *prima facie* applies to a legitimate as against an illegitimate child. (*The Queen v. Totley (Inhabitants)* 7 Q.B.R. 596, 599; 115 E.R. 614), unless there is something to the contrary in the statute or a wider meaning is more consonant with its object (*Woolwich Union v. Fulham Union*, [1906] 2 K.B. 240, 247). The same principle applies as regards an adopted child. (*In re Fletcher*, [1949] Ch. 473.) *Prima facie* ‘child’ means legitimate issue of the first generation.”

Mr. Nazareth attacked the correctness of this passage and asked us to overrule it. He cited several cases where in wills illegitimate or adopted children were permitted to take under a devise to “children”. These decisions depended on the presumed intention of the testator gathered from the fact that he had no legitimate children who could take or from some other surrounding circumstance and are not, I think, of much assistance in construing a statutory Regulation. Mr. Nazareth also drew a distinction between the position of an adopted child in England where he is not entitled merely by reason of the adoption to share in the estate of his adoptive father on an intestacy and the position of a Hindu adopted child who is so entitled. As I understood it, this was put forward as showing that the purpose of the Regulation would in some way be served by permitting the entry into the Colony of Hindu adopted children. I am unable to agree. I do not think that the purpose of the Regulation had anything to do with succession to property or that its purpose would have been served by such an extension of the ordinary meaning of “children”. What the

court has to do is to determine the intention as expressed in the words used in the enactment and it may for this purpose consider the mischief the enactment was designed to cure and extraneous circumstances so far as they can justly be considered to throw light upon the subject: *Viscountess Rhondda's Claim* (9), [1922] 2 A.C. 339, 369, 370.

I think that the passage quoted from *Bhanabhai's* case (8), is correct. *Prima facie* “children” in item (c) of the Schedule to the 1940 Regulations meant legitimate natural, and not adopted, children. I see no object plainly aimed at under the Regulations which would make an extension of the *prima facie* meaning of “children” more consonant with their scope. I think that that word must be given the significance which it ordinarily bears. That is the view which has uniformly been taken in this court.

In *Hirji Devchand Ramji v. Attorney-General* (10) (1956), 23 E.A.C.A. 20, Jenkins, J.A., in delivering the leading judgment, to which the other judges agreed, said at p. 24:

“In any event, no authority has been cited to us which would constrain us to hold that an adopted son of a Hindu resident of Kenya, even if validly adopted under Hindu law, is a ‘child’ of such resident within the meaning of category (c) of the Kenya Defence (Women and Children) Regulations, 1940”.

Chimanlal Motibhai Hira Patel v. Attorney-General (5), was another case in which an alleged adopted son had entered Kenya on a representation made by his alleged adoptive father that he was “my son”. An extract from my judgment with which the other judges agreed reads:

“One reason and probably the main reason why the immigration officer was ‘satisfied’ that the appellant came within a permitted category of immigrant was the letter from Motibhai stating that the appellant was his son. It is now admitted that the appellant was not Motibhai’s true son. The statement that the appellant was a son was a misrepresentation at the time that it was made: *Bhagubhai's* case (*supra*).”

The judgment went on to consider validation by ex post facto legislation and stated that if a misrepresentation could be cured by ex post facto legislation (a point which it was not necessary to decide) it would still be a misrepresentation unless the appellant was an adopted son. That, however, was another topic and did not affect the previous dictum that the statement that the appellant was a son when he was not a true son but was admitted to be only an adopted son was a misrepresentation.

These passages were cited with approval in *Attorney-General v. Govindji H. N. Shah* (2).

Mr. Nazareth argued that since in these cases the adoption had not been properly proved, these passages were obiter. That is correct. But the passages all trend the same way and I think that they are right. In my opinion “children” in category (c) of the Schedule to the 1940 Regulations did not include adopted children. The same applies to “child” in reg. 3 (d) of the Immigration (Control) (Exemption) Regulations. I think that it follows that to state in a letter designed to gain permission to enter the Colony under category (c) of the Schedule to the 1940 Regulations that a child is the son of the applicant when he is not a natural, but an adopted, son and not to disclose that he is merely an adopted son is a “misrepresentation” and a “non-disclosure” of a material circumstance within the meaning of s. 8 of the 1956 Ordinance. Whether it was international or inadvertent is, under that section, immaterial. That seems a hard provision; but policy is not for us.

Similarly, I see no object plainly aimed at in the 1948 Ordinance which would constrain me to hold that the Legislature when enacting s. 8 and other sections

in which the word “children” appears intended to depart from the ordinary meaning of that word and to include adopted or illegitimate children of immigrants. The Legislature must, in my view, be taken to have known the ordinary legal meaning of “child”. The Interpretation and General Clauses Ordinance then in force did not contain any provision corresponding to the definition of “son” in the Interpretation and General Clauses Ordinance, 1956, hereinafter referred to.

It remains to deal with the alternative thesis which found favour with the learned judge that the definition of “son” in s. 3 (1) of the Interpretation and General Provisions Ordinance, 1956, has retrospective effect and in some way affects the meaning of the word “children” in the Schedule of the 1940 Regulations and renders what might otherwise be a misrepresentation in Naran Punja’s letter not a misrepresentation. The learned judge said:

“There is however another answer. Section 3 (1) of the Interpretation and General Provisions Ordinance provides:

‘3.(1) In this Ordinance and in every other written law, other than an imperial enactment, and in all public documents enacted, made or issued before or after the commencement of this Ordinance, the following words and expressions shall have the meanings hereby assigned to them respectively, unless there is something in the subject or context inconsistent with such construction or interpretation, or unless it is therein expressly otherwise provided:

.....

“son”, in the case of any person whose personal law permits adoption, includes an adopted son;’

This section has retrospective effect. The description therefore of the plaintiff as the son of Naran Punja is no misrepresentation.”

The same argument was raised in *Govindji Hirji’s* case (2), where it was dealt with in this court as follows:

“It remains to deal with one further argument advanced on behalf of the respondent. This was based on s. 3 (1) of the Interpretation and General Provisions Ordinance, 1956, which, so far as material, reads: [The judgment then set out s. 3 (1) and continued]

“It was argued that, in view of this Hirji Nathoo’s statement in his letter of January 24, 1947, that the respondent was his son was not a misrepresentation. It is only necessary to point out (a) that s. 3 (1) of the Interpretation and General Provisions Ordinance, 1956, does not apply to letters unless they are public documents; and (b) that the word in the Defence (Admission of Women and Children) Regulations, 1940, is not ‘son’. In my opinion the definition of ‘son’ has no application in the present case. I incline to the view also that a misrepresentation which was a misrepresentation at the time would not be cured by ex post facto legislation, unless that legislation was specifically directed to it. I agree with the learned judge in rejecting this argument.”

I would only now add that s. 3 takes effect from the date of commencement of the Interpretation and General Provisions Ordinance, 1956, that is to say from December 11, 1956, with respect to written laws and public documents made before or after that date, so that if the 1940 Regulations were still in force and contained the word “son”, that word would (subject to the context) now be read so as to include an adopted son in the case of a person whose personal law permits adoption. But s. 3 would not affect the meaning of the word “son” (even if the Regulation had contained that word) appearing in a Regulation

made in 1940 and revoked long before the commencement of the Interpretation Ordinance, 1956. The word “son” does not appear in the relevant part of the 1948 Ordinance.

Learned counsel for the respondent asked that if we were against him on his main contentions, he be given an opportunity to argue that the respondent, being a British subject, if he could be deported at all, could only be deported under the Deportation (Immigrant British Subjects) Ordinance, 1949 (Ordinance 37 of 1949); but that, as he was a person who was deemed to “belong to Kenya” within the meaning of s. 2 (2) of that Ordinance, he could not be deported under that Ordinance or at all. We gave an opportunity for this point to be argued.

It seems quite clear to me that the Deportation (Immigrant British Subjects) Ordinance has no application to the present case. That Ordinance is an Ordinance to regulate the deportation of undesirable immigrant British subjects. Section 3, to which counsel referred, gives power to make deportation orders in respect of immigrant British subjects who do not belong to Kenya and who are either convicts recommended by a court for deportation, or undesirable persons as defined. There is no suggestion that the respondent is a convict and no evidence that he is an undesirable person: indeed the evidence is to the contrary. It is unnecessary to decide whether a person whose residence in Kenya was unlawful in its inception could be said to “belong to Kenya” within the definition. It must not be taken to decide that he could. The respondent is not being, and could not be, dealt with under the Deportation (Immigrant British Subjects) Ordinance. He is being deported under the Immigration Ordinance, 1956 (which contains no exemption in favour of British subjects from other parts of the Commonwealth) because he gained entry to Kenya by means of a material misrepresentation or non-disclosure and his presence in Kenya is, and has throughout been, unlawful. His subsequent entries were re-entries depending on an unlawful original entry.

This appears to be a hard case; but, as I have already said, policy is not for us.

I would allow the appeal with costs here and below. The decree dated September 1, 1960, should be set aside. I see no reason to suppose that the removal order made under s. 11 of the 1956 Ordinance is not valid.

Crawshaw JA: I have had the advantage of reading the judgments of the learned President and Newbold, J.A., and agree the order allowing the appeal proposed by the President. The word “children” in a statute *prima facie* means natural children, and before extending the meaning in the immigration laws to include adopted children it would be necessary to consider whether the apparent objects of the legislation would be better served by so doing. I do not think this is so. The Immigration (Control) Act of 1948, and the Regulations made thereunder which were in force at the time the respondent entered Kenya, were tightly drawn, if one may use such a description, and persons seeking entry were closely classified. Had the legislature intended to broaden the ordinary meaning of the word “children” to include adopted children it would in my opinion have specifically so provided, especially in view of the strict nature of the controls being enacted.

There is a further consideration, and one which the legislature may well have had in mind, and that is the manner and effect of adoption in different countries and amongst different communities. I do not profess to have any particular knowledge of this and it is not to be expected that immigration officers would have, but it may be that in some communities a comparatively loose relationship is created by adoption of children—even one which might be broken and allow of easy abuse of the immigration laws if the word “children” was extended to include such adoptees. Apart from relationship, the manner of

adoption in some countries might be such as to make it very difficult for the immigration

authorities satisfactorily to assure themselves of the genuineness of the adoption and to prevent abuse, although in the present case the genuineness of the adoption has not been contested. In England, as in Kenya, for instance, adoption is by order of a court, which is capable of easy proof, whilst under Hindu law there is not necessarily any such authoritative procedure capable of easy verification.

Special situation may arise under certain provisions of the immigration laws of 1948, such as those which relate to children of members of Her Majesty's Forces and Consular Officers (s. 6 (3)). I do not, however, think that any difficulty or embarrassment would arise thereunder such as to justify a wider meaning being given to the word "children" as used throughout the 1948 immigration laws as a whole. Procedure is available under those laws sufficient to meet such situations.

Newbold JA: Under s. 11 of the Immigration Ordinance, 1956, (hereinafter referred to as "the 1956 Ordinance"), which came into operation on July 1, 1957, the Minister may make an order directing the removal from Kenya of any person whose presence within Kenya is unlawful under that Ordinance. On July 23, 1959, the Minister made an order (hereinafter referred to as "the order") which, after reciting that the respondent was a prohibited immigrant within the meaning of the 1956 Ordinance and that his presence within Kenya was unlawful under that Ordinance, directed that the respondent be removed from Kenya. The respondent thereafter brought a suit against the appellant claiming a declaration that the Order was unlawfully made and was a nullity. He was successful in such suit and the Supreme Court of Kenya made the declaration asked for, whereupon the appellant appealed to this court against the decision.

The basic issue is whether the respondent was on July 23, 1959, lawfully in Kenya; if he was, then the decision of the Supreme Court is correct; if he was not, then the Order was properly made and the decision of the Supreme Court is incorrect. The case is complicated by reason of the fact that between the time when action was first taken for the entry of the respondent into Kenya and the date of the Order the relevant legislation has twice been changed. In my view, however, the provisions of s. 18 (2) of the 1956 Ordinance clearly place the burden of proof on the respondent to show that on July 23, 1959, he was not a prohibited immigrant; that his entry into Kenya had been lawful; and that his subsequent presence in Kenya had always from such lawful entry up to that date been lawful. It is also clear that under s. 8 of the 1956 Ordinance if the respondent entered Kenya as the result of an authority granted by reason of any intentional or inadvertent misrepresentation or non-disclosure of a material fact then the authority was of no effect, with the result that his entry into and subsequent presence in Kenya under that authority was unlawful.

Under the provisions of s. 7 (1) of the 1956 Ordinance, so far as they are relevant to the facts of this case, a person who is not entitled to be granted a resident's certificate and whose entry into Kenya was, at the time of the entry, unlawful is a prohibited immigrant and his presence in Kenya is unlawful. If, on the particular facts of this case, the respondent on July 23, 1959, was either entitled to be granted a resident's certificate, or his entry into Kenya was not, at the time of such entry, unlawful then he is not under s. 7 of the 1956 Ordinance a prohibited immigrant nor is his presence in Kenya unlawful under that section. Under the provisions of s. 19 of the 1956 Ordinance, so far as they are relevant to the facts of this case, if the respondent's presence in Kenya was unlawful under the Immigration (Control) Ordinance (Cap. 51 of the Laws of Kenya, and hereinafter referred to as "the 1948 Ordinance") then he is deemed to be unlawfully in Kenya under the 1956 Ordinance. So far as I am aware there is no other provision in the 1956 Ordinance relevant to the facts of this case

whereby his entry into or presence in Kenya could be regarded as unlawful. It therefore appears that while the onus is on the respondent to prove that his entry into and presence in Kenya was lawful, an order could not have been made in respect of the respondent unless his presence in Kenya was on the date of the Order unlawful under either s. 7 or s. 19 of the 1956 Ordinance. In either case the issue comes back to the question of whether the respondent's entry into and subsequent presence in Kenya was unlawful under the law existing prior to the 1956 Ordinance.

Up to July 31, 1947, the relevant Ordinance governing immigration was subject to the Defence (Admission of Women and Children) Regulations, 1940, (hereinafter referred to as "the Defence Regulations") which prohibited, *inter alia*, the entry of children under eighteen years into Kenya subject to the power of an immigration officer to permit the entry of such children in certain circumstances. On August 1, 1948, the 1948 Ordinance came into effect and the previous legislation, including the Defence Regulations, was repealed or revoked.

The respondent first entered Kenya on September 15, 1948, at which date he was about fourteen years old. He was the natural son of Jina Punja but had been adopted by his uncle Naran Punja in India in 1940. It is not disputed that the respondent was lawfully adopted by Naran Punja nor is it disputed that, according to the personal law of the respondent and Naran Punja, the respondent as the result of the adoption in effect stood in the same relationship to Naran Punja as if he had been his natural son. Naran Punja came to Kenya in 1944 and on August 23, 1947, wishing to have the respondent with him, he wrote to the immigration officer asking for his son's name (which he gave as Shivji Naran) to be inserted on his (Naran's) passport or for an entry permit for his son. At that time the Defence Regulations were in force and Naran Punja received a letter dated October 15, 1947, stating that there was no objection under the Defence Regulations to the entry of the respondent subject to certain conditions which are not material to this case. The respondent, however, did not enter Kenya until September 15, 1948, by which time the Defence Regulations were no longer in force and the relevant law was contained in the 1948 Ordinance and the Regulations made thereunder. When the respondent entered Kenya he was in possession of an Indian passport in which his father's name is shown as Naran Punja. As the learned judge stated, he presumably showed to the immigration officials the letter of October 15, 1947, his passport was stamped and he was permitted to land. At the hearing before the learned judge it was agreed that this letter was the authority for the respondent's entry into Kenya. I am not quite sure what this agreement means nor am I clear as to the precise authority under which the respondent can be said to have entered, but I consider it a most natural inference from the evidence and exhibits that the entry of the respondent and the stamping of his passport was consequent upon the production of the letter of October 15, 1947.

In my view the question as to whether the respondent entered Kenya lawfully must be determined in the light of the legislation in force at the time of his entry and under that legislation alone. On September 15, 1948, there was no provision in the 1948 Ordinance whereby any authority granted under the previous law to enter was to be deemed to be an authority under the 1948 Ordinance. Nor, in my view, has s. 13 (3) (c) of the Interpretation and General Clauses Ordinance (Cap. 1 of the Laws of Kenya) any application to the matter, as I do not regard the letter of October 15, 1947, as conferring any right or privilege, quite apart from the question that it was issued under Defence Regulations which were not revoked by the 1948 Ordinance. I do not consider that any action taken or any representation made before the coming into operation of the 1948 Ordinance has any relevancy to the question of the lawfulness or otherwise of the entry of the respondent on September 15, 1948, save in so far as it had a continuing effect on that date. What is, in my view, relevant is the action taken and the

representations made on September 15, 1948, which representations, if they are to be related to any law, must be related to the law existing at that date.

It has been submitted that the respondent's entry on September 15, 1948, was unlawful by reason of the fact that the authority for his entry into Kenya, no matter what the precise form of such authority, was granted as a result of a misrepresentation or non-disclosure of a material fact. The misrepresentation or non-disclosure arose, it was submitted, from the fact that Naran Punja in his letter of August 23, 1947, referred to the respondent as his son without stating that he was his adopted son. For the reason I have given, assuming that the statement was a misrepresentation or non-disclosure of a material fact on August 23, 1947, in relation to the law in force at the time it was made, it either has no relevance to the authority to land given on September 15, 1948, or it must be regarded as a representation made on that date and in relation to the then existing law and circumstances. As was said by this court in *Keshavlal Punja Parbat Shah v. Superintendent of H.M. Prison* (1), at p. 423 in relation to an entry consequent on a letter similar to the letter in this case:

“... this letter does not even purport to be an entry permit ... This was no doubt a very valuable document for an intending entrant to hold and produce to the immigration officer who had to decide whether or not to permit him to enter ... It would allay the officer's doubts on many points ... but it would not satisfy him as to age at the time of entry or as to (other points). On these points only the immigration officer at the time and place of intended entry could possibly form a proper decision. It was his duty, and no one else's to decide then and there whether or not to permit entry. A document of this kind is not an entry permit ...”

It is obvious that it is the representations and conduct at the time of entry and those only which are relevant. For example, if the letter from the immigration officer had been based on a representation which was correct at the time it was made but incorrect at the time of entry, for example, a person who was a wife at the time the letter was written but ceased to be such on entry, and the entry was granted on the basis of that representation, then the entry would be granted on a misrepresentation. I have set this aspect of the case out at some length because previous decisions and dicta of this court to which attention has been drawn relate to entry into Kenya during the currency of the Defence Regulations and to representations made in relation to such an entry. It has been held that the word “children” in the Defence Regulations does not include adopted children. There were urgent reasons for such decisions, as the object of the Defence Regulations was to limit the entry into a war-torn Kenya of persons who would not be of assistance to the war effort. There are also dicta of this court to the effect that to describe an adopted son as a son is a misrepresentation of a material fact. Such dicta, however, related to cases in none of which had it been proved as a fact that the child in question was a lawfully adopted son and the representation was made in relation to legislation which it has been held did not include adopted children. In my view, therefore, the determination of whether the respondent's entry to Kenya was lawful has to be determined in the light of representations made on September 15, 1948, considered against the background of the law in force on that date.

What representation was made on September 15, 1948? There is no evidence of any specific representation having been made by the respondent but, as I have said, the respondent must have produced the letter of October 15, 1947, and I regard this as a representation at the time of entry that he was the son of Naran Punja. Is it a misrepresentation or non-disclosure of a material fact to describe a lawfully adopted son as a son? The first definition of the word “son” in the Shorter Oxford English Dictionary is: “A male child or person in relation to either or both of his parents”. The second definition is a theological one and the

third is: "One who is regarded as, or takes the place of, a son". A misrepresentation is an incorrect representation. Having regard to these definitions I cannot see how it can be said that it is a misrepresentation to describe a lawfully adopted son as a son. To my mind to say so would be equivalent to saying that it is a misrepresentation to describe a fox-terrier as a terrier. It must be borne in mind that this court is not asked to determine whether the word son in an enactment includes an adopted son, but whether it is a misrepresentation to describe a lawfully adopted son as a son. In my view it clearly is not and I know of no authority which would constrain me to hold otherwise. Is such a description, however, a non-disclosure of a material fact? If the legislation governing entry into Kenya on September 15, 1948, draws a distinction between a natural son and a lawfully adopted son, then the category into which a person fell would be a most material fact and the use of a word which made it uncertain into which category a person fell would be, in my view, a non-disclosure of a material fact. The question then is whether the 1948 Ordinance drew a distinction between a natural son and a lawfully adopted son or, to put it another way, whether the word "children" in the 1948 Ordinance and the Regulations made thereunder did not include adopted children. It has been submitted that the Interpretation and General Provisions Ordinance, 1956, which came into operation on December 11, 1956, has effect so that the word children in the 1948 Ordinance meant, on September 15, 1948, adopted children. I do not agree. That Ordinance, though it applies to previously enacted legislation, does so only as from December 11, 1956, and therefore has no relevance to the interpretation of the 1948 Ordinance in 1948.

Prima facie the expression children in legislation means lawful natural children, but the meaning of that expression may be extended to include, for example, adopted children, if such an extended meaning is more consonant with the object of the legislation. Is there anything in the 1948 Ordinance or the object of the Ordinance which shows reasonably plainly that an extended meaning is to be given to the word children, at any rate in so far as an adopted child is concerned? The 1948 Ordinance was designed to control immigration in conditions vastly different from those to which the Defence Regulations related. It gave certain rights to persons who were permanently resident in Kenya and it controlled the entry of persons into Kenya. In doing so it had regard to the wife and children of any such person, the family unit, if I may use the expression. It would seem to me extraordinary that any such legislation should draw a distinction between natural children and lawfully adopted children, each of whom would form part of the family unit. Such a distinction would become all the more extraordinary in the case of children adopted under the provisions of the Adoption of Children Ordinance (Cap. 21 of the Laws of Kenya), as it is provided by s. 7 (1) of that Ordinance that the rights and liabilities of the natural parents relating to such matters as custody, maintenance, education and consent to marriage shall be extinguished and shall vest in and be enforceable against the adopted parents "as though the adopted child was a child born to the adopter in lawful wedlock". These facts in themselves make it reasonably plain to my mind that it would be more consonant with the object of the 1948 Ordinance to include within the term children the lawfully adopted children. But there is internal evidence to the same effect from the 1948 Ordinance itself. For example, in s. 5 (1) (i) it is provided that the entry into and presence in Kenya of the dependent children under eighteen years old of a prohibited immigrant is unlawful. Can that possibly mean that such entry into and presence in Kenya is unlawful only if they are natural children? In s. 6 (3) it is provided that where a Consul who, together with the members of his household, has entered Kenya by virtue of his office ceases to be employed as such, he, together with his wife and children, shall be deemed to be persons seeking to enter Kenya with effect from the date he ceased to be so employed. Can that possibly mean that the

natural children are seeking entry but the adopted children are not and therefore, presumably, are lawfully in Kenya? A careful examination of the 1948 Ordinance and the Regulations made thereunder leaves no doubt in my mind that it would be more consonant with the object of the 1948 Ordinance and with its provisions to include lawfully adopted children within the expression children. This being so, in my view there was no non-disclosure of a material fact, as whether the respondent was a natural son or a lawfully adopted son was not material for the purposes of the 1948 Ordinance. For these reasons, in my view, I do not consider that the authority of the entry of the respondent into Kenya was granted as a result of a misrepresentation or non-disclosure of a material fact.

There is still left for decision, however, the question of whether the respondent is lawfully in Kenya, which in turn comes back to the question of under what lawful authority did the respondent enter Kenya, as it is not suggested that anything subsequent to his entry made his presence in Kenya unlawful. This question has given me considerable difficulty. Section 6 of the 1948 Ordinance provides that no person may enter Kenya unless he is in possession of one of the authorities set out therein. The evidence before the learned judge and the agreement of counsel show that the respondent first entered Kenya on the authority of the letter of October 15, 1947. In those circumstances there does not seem any room for a presumption that he entered Kenya on September 15, 1948, by any other authority. The letter of October 15, 1947, would not seem to be an authority referred to in s. 6 of the 1948 Ordinance. Nor would it appear that the respondent comes within the scope of the Immigration (Control) (Exemption) Regulations which, so far as they are relevant, would seem to exempt from the provisions of s. 6 a child of a permanent resident only if the child has completed a specified course of education. In the result the position seems to be that the respondent with the approval of an immigration officer was permitted to enter Kenya on September 15, 1948, by a particular authority which was not a sufficient authority in law. The position would have been no different had the respondent in fact been the natural son of Naran Punja. In these circumstances was his entry lawful? I have grave doubts as to whether it was, whatever hardships may result therefrom. In my view, however, I am relieved from deciding the matter on that issue as, even if the entry on September 15, 1948, was unlawful, should there be a subsequent lawful entry and thereafter lawful presence in Kenya then the Order would none the less be unlawfully made. The evidence was that the respondent left Kenya in 1952 and returned to Kenya after three months in accordance with a re-entry permit. His passport shows that a re-entry pass, valid till December 12, 1953, was granted on December 13, 1951, and that he re-entered Kenya on November 17, 1952. As there was no evidence relating to the circumstances in which the re-entry permit was granted, it must under s. 114 of the Indian Evidence Act, as applied to Kenya, be presumed to have been lawfully granted unless it was granted directly or indirectly by reason of a misrepresentation or non-disclosure of a material fact. The only alleged misrepresentation or non-disclosure of which there is any evidence was that which resulted in the respondent's entry in 1948. I have already stated that in my view the representation made on September 15, 1948, was not a misrepresentation or non-disclosure of a material fact. In my view, therefore, the entry of the respondent into Kenya in 1952 was lawful, whatever may have been the position in relation to the 1948 entry, and the presence of the respondent in Kenya since at least 1952 was also lawful. It follows that in my view this appeal should be dismissed.

This being my view it is unnecessary for me to deal with the point that as the respondent is a British subject who belongs to Kenya within the meaning of the Deportation (Immigrant British Subjects) Ordinance, 1949, therefore he cannot be the subject of a deportation order under the 1956 Ordinance. As the matter

has been raised, however, I think I should say that in my view there is no substance in the point.

The order of the court is that the appeal be allowed with costs here and below. The decree of the Supreme Court dated September 1, 1960, must be set aside.

Appeal allowed.

For the appellant:

JK Havers (Crown Counsel, Kenya)

For the respondent:

JM Nazareth QC and *DV Kapila*

For the appellant:

Advocates: *The Attorney-General*, Kenya

For the respondent:

DV Kapila, Nairobi

Saleh Ahmed alias Saleh Maviyambuzi v R
[1961] 1 EA 669 (CAZ)

Division:	Court of Appeal at Zanzibar
Date of judgment:	9 November 1961
Case Number:	161/1961
Before:	Sir Kenneth O'Connor P, Crawshaw JA and Law J
Appeal from:	H.M. High Court of Zanzibar—Horsfall, J

[1] Criminal law – Unlawful assembly – Particulars of charge – Charge alleging assembly with intent to commit an offence – Intended offence not specified in charge – Whether charge defective – Penal Decree, s. 72 (Z.).

Editor's Summary

The appellant was convicted of unlawful assembly contrary to s. 72 of the Penal Decree and his appeal to the High Court having been dismissed he appealed again. The charge alleged that the appellant had assembled with other people unknown with intent to commit an offence. The evidence showed that during a state of emergency in Zanzibar, following election riots, a group of armed men, including the appellant, went to the house of a woman and asked where her husband and his bicycle were. One of the group searched for the bicycle and not finding it said that the husband was a liar and that he had taken it

to save it from being broken. The woman subsequently found the bicycle broken and left on her fence.

Held –

- (i) the charge was defective in that it was not therein alleged that three or more persons had assembled and because the offence the assembly intended to commit was not specified.
- (ii) although the charge was defective, the appellant was left in no doubt after the evidence of the first prosecution witness that more than three persons were assembled and the intention alleged was to commit malicious damage to the bicycle; accordingly no failure of justice was occasioned by the irregularities in the charge.

Appeal dismissed.

Case referred to:

- (1) *Chande bin Khamis Mtumbatu and Others v. R.*, [1961] E. A. 587 (C.A.).

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court:

The appellant was convicted by a resident magistrate in Zanzibar of unlawful assembly contrary to s. 72 of the Penal Decree. His appeal to the High Court was dismissed. He now appeals to this court.

The facts found by the learned resident magistrate were that on June 3, 1961, a group of about twelve armed men, including the appellant, went to the house of a woman Mwanaheri binti Abdulla, wife of Mgeni, and asked where her husband was and also asked where his bicycle was. Mwanaheri replied that her husband was not at home and that his bicycle also was not there. On that date a state of emergency, following election riots, existed in Zanzibar and disturbances were widespread. A man from the group searched for the bicycle and, not finding it, said to Mwanaheri

“your husband is a liar where will he take the bicycle to save it from being found and be broken”.

The group was armed with sticks and bush knives. The bicycle was afterwards found by Mgeni broken and left on his back fence.

The learned resident magistrate found that the group had assembled with intent to cause malicious damage to property. There was ample evidence on which he could so find.

The relevant charge of unlawful assembly merely charged the appellant with having assembled with other people at present unknown with intent to commit an offence. This charge was defective in that it was not alleged that three or more persons assembled and because the offence which it was alleged that the assembly intended to commit was not specified. We think, however, that, notwithstanding these defects, the conviction should not be upset, as the appellant could have been left in no doubt after the evidence of the first prosecution witness that more than three persons were assembled and that the intention alleged was an intention to commit malicious damage to Mgeni's bicycle. In this latter respect this case differs from *Chande bin Khamis Mtumbatu and Others v. R.* (1), [1961] E.A. 587 (C.A.).

We are satisfied that no failure of justice has been occasioned by the irregularities in the charge. The appeal is dismissed.

Appeal dismissed.

The appellant in person.

For the respondent:

WJ Dourado (Crown Counsel, Zanzibar)

For the respondent:

The Attorney-General, Zanzibar

Division: HM Supreme Court of Kenya at Nairobi
Date of judgment: 16 June 1961
Case Number: 10/1960
Before: Mayers J

[1] Income tax – Limitation – Assessment made seven years after year of income – Whether assessment statute barred – East African Income Tax (Management) Act, 1958, s. 102, s. 105, s. 113 – East African Income Tax (Appeal to the Supreme Court) Rules, 1959, r. 10 – Indian Evidence Act, 1872, s. 105 – Evidence Act (Amendment) Ordinance (Cap. 12), s. 3 (K.).

Editor’s Summary

On December 19, 1959, the respondent issued certain tax assessments in respect of the income of the deceased, one Pritam, for the years of assessment 1945–1951 and also for the years of income 1951–1953. The appellant as administratrix of the deceased appealed from all the assessments. At the hearing of one appeal (No. 10 of 1960) relating to the year of assessment 1945, the appellant took the preliminary point that the assessment challenged was incompetent, as s. 105 (i) of the East African Income Tax (Management) Act, 1958, ex facie precluded the making of any assessment more than seven years after the year of income to which it related and that the burden of proving such facts as were necessary to bring any particular case within the ambit of the proviso relating to fraud or any gross or wilful neglect rested upon the respondent. The respondent disputed this contention on the ground that by virtue of r. 10 of the Income Tax (Appeal to the Supreme Court) Rules, 1959, the provisions of which were mandatory, the appellant was required to give such evidence as he desired to give before the respondent was called upon at all, and that by s. 113 (c) *ibid* the onus of proving that an assessment was excessive was on the person assessed. It was further argued that the appellant’s contention was inconsistent with the principle that the onus is always on the taxpayer to show that the original assessment is excessive, and that by virtue of s. 105 (i) of the Indian Evidence Act, 1872, as amended, the burden of proving that an assessment is statute barred is on the taxpayer.

Held – if the respondent seeks to maintain that any particular assessment which, on the face of it, is expressed to have been made more than seven years after the end of the year of income to which it relates, is not statute barred, he must call evidence of such a nature as to establish that there was a preponderance of probability that the taxpayer in relation to his income tax for the relevant year of assessment either acted fraudulently or was in gross or wilful default.

Preliminary objection upheld.

Cases referred to:

- (1) *Carter v. Jones*, 6 C. & P. 64; 172 E.R. 1147.
- (2) *Mercer v. Whall*, [1845] 5 Q.B. 447; 114 E.R. 1318.
- (3) *The Commissioner of Income Tax v. N. R. Bapoo* (Case No. 56), 2 E.A.T.C. 397.
- (4) *O. et al v. The Commissioner of Income Tax* (Case No. 15), 1 E.A.T.C. 124.

Judgment

Mayers J: The appellant is the administratrix of the estate of one A. Pritam, hereinafter referred to as “the deceased”.

On or about the 19th day of December, 1959, the respondent issued certain purported assessments to income tax in relation to the income of the deceased for the years of assessment 1945–1951 (both inclusive) and for the years of income 1951–1953 (both inclusive). At this juncture it may conveniently be observed that there may be some dispute as to whether the assessments purported to have been made in relation to the years of assessment 1947, 1948 and 1949 were amended assessments or additional assessments; a matter upon which much may turn at a later stage but in relation to which it is unnecessary to say more at present.

The appellant, having objected to each of the above-mentioned assessments and the respondent having confirmed those assessments, ten appeals, numbered Civil Appeal 10–19 (both inclusive) of 1960 were filed and came on for hearing on January 24, 1961.

On appeal No. 10 being called on I enquired whether it was desired, as is usual where a number of income tax appeals at the instance of the same appellant appear consecutively in the day’s list, that they should be consolidated. To this Mr. Bechgaard, who appears in all of the appeals for the appellant, replied that although consolidation might possibly be appropriate at a subsequent stage, it would be preferable for me to hear argument in relation to a preliminary point which applied to some, but not to all, of the appeals and to rule thereon before deciding whether or no the appeals ought to be consolidated.

The most appropriate course, and the course which I propose to adopt, would seem to me to be to treat Mr. Bechgaard’s point as having been taken in appeal No. 10 and, upon my arriving at a conclusion in relation to that point, to ascertain in respect of which if any of the remaining appeals the parties are prepared to submit to an order being made in terms of that made upon the preliminary point in relation to appeal No. 10 without further argument but also, of course, without prejudice to the party’s right to challenge that order hereafter.

Quite shortly, the preliminary objection is that the assessments challenged in appeals Nos. 10–17 are incompetent by virtue of the provisions of s. 105 (1) of the East African Income Tax (Management) Act, 1958. Those provisions are, so far as material, in the following terms:

“An assessment may be made under s. 102, s. 103 or s. 104 at any time prior to the expiry of seven years after the year of income to which the assessment relates; provided that:

- (a) Where any fraud or any gross or wilful neglect has been committed by or on behalf of any person in connection with or in relation to tax for any year of income, an assessment in relation to such year of income may be made at any time:”

No argument was addressed to me as to the inapplicability of s. 105 (1) to assessment in respect of years of income anterior to the enactment of the East African Income Tax (Management) Act, 1958, and I, therefore, assume for present purposes that those provisions are applicable.

Mr. Bechgaard’s contention is that the purview of s. 105 (1) (*supra*) *ex facie* precludes the making of any assessment more than seven years after the year of income to which it relates and that the burden of proving such facts as are necessary to bring any particular case within the ambit of the proviso, rests upon the respondent.

Mr. Summerfield, who appears for the respondent, sought to answer this contention in three distinct ways: First, he relied upon the provisions of r. 10 of the Income Tax (Appeal to the Supreme Court) Rules, 1959, the interpretation

of which has only been canvassed once, in an appeal before Rudd, J., and has never been decided. Rule 10 is as follows:

“On the day fixed . . . the appellant shall be heard in support of the appeal.

“(2) The court shall then, if it does not dismiss the appeal at once, hear the respondent and the appellant shall be entitled to reply.”

According to Mr. Summerfield, this provision is mandatory and necessitates that the appeal be opened by the appellant and, therefore, that the appellant must give such evidence as he desires to give before the respondent is called upon at all. The conclusion that if r. 10 is mandatory the burden of proof must necessarily rest upon the appellant is, in my view, a non sequitur. In general, no doubt, the party upon whom rests the burden of proof enjoys the right to begin, but this is not invariably so. Thus, where unliquidated damages are claimed, the plaintiff had the right to begin unless the defendant has expressly admitted that the plaintiff is *prima facie* entitled to recover the full sum, vide *Carter v. Jones* (1), 6 C. & P. 64, where Tindall, C.J. said:

“The judge certainly have come to a resolution that justice would be better administered by altering the rule of practice . . . and that, in future, the plaintiff should begin in all actions for personal injuries, and also in slander and libel, notwithstanding the general issue may not be pleaded and the affirmative be on the defendant.”

In effect, this passage seems to me to indicate that by the resolution referred to by Tindall, C.J., the judges indicated that there was no essential reason why the right to begin should be tied to the burden of proof and it would clearly be wholly anomalous to tie the burden of proof to a merely procedural provision relating to the right to begin.

So too, in *Mercer v. Whall* (2), [1845] 5 Q.B. 447; 114 E.R. 1318 at p. 1323, Lord Denman, C.J., after discussing variation in the practice as to who should begin said:

“The judge perhaps decided this matter without very adequate materials, but he would not have thought of doing so at all if the right depended on the issue as it appeared on the record.”

The purpose of legal procedure is to enable the parties to obtain a determination of their legal rights. Procedural provisions are therefore, in general, to be regarded as directory rather than mandatory and ought not, in the absence of plain words, to be so construed as to defeat the substantive rights of litigants. If, therefore, but for the provisions of r. 10 the burden of proof would rest upon the Commissioner it would, in the absence of the clearest possible words, be wrong so to construe r. 10 as to cause the burden of proof to shift.

Even assuming that r. 10 is mandatory it does not necessarily follow that the obligation imposed by that rule upon the appellant to open his case necessarily affects the burden of proof, as in many cases that burden may shift from time to time, although the order of addresses remains constant.

Further, Mr. Summerfield relied upon the provisions of s. 113 (c) of the East Africa Income Tax (Management) Act, 1958. Those provisions are as follows:

“In every appeal to a judge under s. 111, the following provisions shall apply: . . .

(c) The onus of proving that the assessment objected to is excessive shall be on the person assessed.”

Mr. Summerfield argues that Mr. Bechgaard's contention was inconsistent with the decision in *The Commissioner of Income Tax v. N. R. Bapoo* (3) (Case No. 56), 2 E.A.T.C. 397, in which Briggs, V.-P., as he then was, cited with approval the decision in *O. et al v. The Commissioner of Income Tax* (4), (Case No. 15), 1 E.A.T.C. 124, where he said at p. 128:

"It must be remembered that an appeal from a local committee differs from an ordinary appeal from a subordinate court in that the high court is obliged, regardless of any findings of the committee, to approach every issue of fact as *res integra*, and to make its own findings thereon, and that in so doing it is bound by a provision that the onus is always on the taxpayer to show that the original assessment was excessive. This applies equally whether the taxpayer or the Crown is the appellant . . . the position is, therefore, that, in any appeal by the Crown to the high court where the issue is one of disputed fact, unless the taxpayer adduces not merely some evidence, but sufficient evidence to satisfy the court, the appeal automatically succeeds."

On the face of it the latter part of those observations would appear strongly to support the contention advanced by Mr. Summerfield. Every judgment must, however, be read in the light of the facts to which it particularly relates. The matter in issue with which Briggs, J.A., as he then was, was concerned was whether or no a particular transaction was a capital transaction, in other words, had the taxpayer been assessed to tax in respect of moneys which did not form part of his income; if he had been so assessed his assessment must manifestly have been excessive. From this it seems to me that the observations of Briggs, J.A., above set out are of no assistance in the instant case as the question for decision here would appear to be not one of the amount of assessment but of the liability to be assessed.

In *O. et al v. The Commissioner of Income Tax* (4), Briggs, J.A., goes on to say, in relation to the procedure to be adopted on the hearing of income tax appeals, at p. 129:

"Where the taxpayer appeals, no difficulty arises, but it would seem that where the Crown appeals a usual and convenient course is that counsel for the Crown should open the appeal generally, and that counsel for the taxpayer should then open if he wishes and call his evidence . . ."

These observations clearly contemplate some variations in procedure to meet the circumstances of the particular case. Upon them, however, no reliance can be placed by Mr. Bechgaard inasmuch as reference was not made to whatever may be the Tanganyikan rule corresponding to r. 10 (*supra*). Furthermore, the contention that s. 113 (c) does not apply where the issue is not one of amount but of liability to assessment, received strong support from the obiter dicta of Corrie, Ag. J.A., in *Bapoo's* case (3), where he says at p. 412:

"To hold that the sub-section relates to liability as distinct from quantum appears to me to be giving the sub-section the meaning that it would have had if it had read:

'The onus of proving that he is not liable to assessment or that the assessment complained of is excessive.'

that is to say, it involves reading words into the sub-section which it does not contain."

Provisions analogous in nature to those contained in s. 102 of the Income Tax (Management) Act, 1958, enabling the Commissioner to assess to income tax persons whom he believes to be liable to income tax but who have failed to make returns are manifestly essential to the protection of the revenue, but

their application must be fraught with the danger of over-assessment in individual cases. It would, in general, be difficult, if not indeed impossible, for the Commissioner to prove the accuracy of such an assessment. Similarly, where the taxpayer has made a return, the accuracy or otherwise of the assessment must in large measure depend upon the correctness of the information supplied by the taxpayer. Hence, it is not surprising that the legislature has thought it necessary to cast upon the taxpayer the burden of proving that any particular assessment validly made is inaccurate in amount. The question whether a particular person falls within a category exempt from income tax either in general, by reason of his being the holder of some particular office—or in respect of any particular year, by reason of the lapse of time, is a very different matter and one, the burden of disproving which would not appear to be unduly onerous. Statutes ought not to be so construed in the absence of express terms as to derogate from the common law. There is abundant authority for the proposition that tax is not exigible from anyone who does not fall clearly within the express words of the taxing statute. By parity of reasoning it seems to me that the words of a taxing statute ought not to be so construed, in the absence of unequivocal words, as to cast upon the taxpayer the burden of proving that he, in fact, falls within some category of exempted persons to which he *prima facie* belongs.

Finally, Mr. Summerfield relied upon s. 105 of the Indian Evidence Act as repealed and re-enacted by s. 3 of Chapter 12 of the Laws of Kenya which is in the following terms:

“In civil proceedings, when any fact is especially within the knowledge of any person the burden of proving that fact is upon him.”

As I understand s. 105 (1) of the East African Income Tax (Management) Act, 1958, its material provisions may be paraphrased as follows:

No assessment shall be made more than seven years after the year of income to which it relates unless fraud or gross or wilful neglect has been committed in relation to tax for that year of income.

Admittedly, it must be peculiarly within the knowledge of the taxpayer whether he has committed fraud or gross neglect in relation to his income but the burden created by s. 105 of the Indian Evidence Act as substituted by Chapter 12 of the Laws of Kenya is a burden of proving affirmative facts, not of disproving facts; in fact Mr. Summerfield’s contention, if correct, would entail casting in every civil case in which fraud is alleged the burden of disproving fraud upon the party against whom fraud is alleged.

For these reasons I hold that if the respondent desires to maintain that any particular assessment which, on the face of it, is expressed to have been made more than seven years after the end of the year of income to which it relates, is not statute barred, he must call evidence which is of such a nature as to establish that there is a preponderance of probability that the taxpayer either acted fraudulently or was in gross or wilful default in relation to his income tax for the relevant year in respect of which he was purported to be assessed to income tax.

Preliminary objection upheld.

For the appellant:

K Bechgaard QC and ZK Ahamed

For the respondent:

JC Summerfield (Deputy Legal Secretary, East Africa High Commission)

For the appellant:

Advocates: *Shapley Barret Ennion and Marsh*, Nairobi

For the respondent:

The Legal Secretary, East Africa High Commission

GP Pabari v Meghji Nathoo Shah and others
[1961] 1 EA 676 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	7 December 1961
Case Number:	44/1961
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Crawshaw JA
Appeal from:	H.M. Court of Uganda–Keatinge, J

[1] Practice – Execution – Payment or adjustment of decree – Attachment issued – Settlement between parties before execution – Advocate for decree holders so informs court – Terms of settlement not stated or recorded on court file – Subsequent application for attachment of shares – Prohibitory order made – Application to set aside order – No record of payment or adjustment of decree – Whether application competent – Civil Procedure Ordinance (Cap.6), s. 35 (1) (U.) – Civil Procedure Rules, O. 19, r. 2(U.) – Judgments Extension Ordinance (Cap. 11), s. 2 (U.).

Editor's Summary

The respondent having obtained judgment against the appellant in Kenya had the decree sent to the magistrate's court at Jinja, Uganda, for execution. Attachment was issued against the movable property of the appellant but, before execution of the warrant, the advocates for the respondent wrote to the court stating that the matter had been settled between the parties and that the attachment should be withdrawn. Subsequently on an application by the respondents for execution by attachment of certain shares a prohibitory order attaching the shares was made. The appellant then applied to the High Court to set aside the prohibitory order on the grounds that the decree was incapable of execution as a settlement had been reached between the parties and the court had been so informed; and that there had been a novation by a partial payment by the appellant and the issue to the respondents of promissory notes by a third party for the balance. The judge dismissed the application holding that the appellant's affidavit in support of the application did not clearly establish that there had been a novation; and that the statements in the letter from the advocate for the respondents to the court that the matter had been settled did not necessarily mean that the respondents had released the appellant from liability. On appeal it was contended that there had been a novation and that, as a settlement had been reached and notified to the court, the prohibitory order should be set aside.

Held –

- (i) there was no sufficient evidence that there had been a novation and the letter from the advocate for the respondents did not necessarily mean that the decree had been adjusted and did not amount to a certificate for the purposes of O. 19, r. 2 (1) of the Civil Procedure Rules.
- (ii) as the appellant had not followed the procedure prescribed in O. 19, r. 2 (2) of the Civil Procedure Rules the alleged adjustment of the decree could not be recognised by the court, with the result that the court was entitled to make the prohibitory order.
- (iii) the application was misconceived and the appellant's remedy as judgment-debtor was to inform the court under O. 19, r.2 (2) of the payment or adjustment which he alleged and to apply for the issue of a notice to the respondents to show cause why the payment or adjustment should not be recorded.

Appeal dismissed.

No cases referred to in judgment

December 7. The following judgments were read:

Judgment

Sir Alastair Forbes V-P: (with which Sir Kenneth O'Connor, P., concurred): This was an appeal from an order of the High Court of Uganda dismissing with costs an application under s. 35 (1) of the Civil Procedure Ordinance to set aside a prohibitory order. After hearing counsel for the appellant we dismissed the appeal with costs. We now give our reasons.

The respondents had obtained judgment against the appellant for the sum of Shs. 6,006/40 together with interest and costs in the Supreme Court of Kenya sitting in Kisumu on June 4, 1960, and the decree was sent to the court of the resident magistrate, Jinja, for execution, the amount due under the decree of July 18, 1960, being certified at Shs. 7,124/80. Execution of a decree so transferred by a Uganda court is authorised by s. 2 of the Judgments Extension Ordinance (Cap. 11), which provides, *inter alia*, that in such case the provisions of the Civil Procedure Ordinance for the transfer and execution of decrees shall apply and that all proceedings shall and may be had and taken as if the decree had been a decree originally obtained in the High Court or a subordinate court in Uganda. Attachment issued on August 4, 1960, against the movable property of the appellant, but, before execution of the warrant of attachment, the advocates for the respondents wrote, on August 8, 1960, to the registrar of the court at Jinja in the following terms:

“Reference the attachment in the above matter.

“We are now instructed that the matter has been settled between the parties and we are instructed to withdraw the attachment.

“Accordingly we request that the attachment be withdrawn and that the broker be notified accordingly.

“We enclose Shs. 24/- court fees for the said withdrawal.”

Upon this application the court ordered:

“So be it.

“Order for withdrawal of attachment issued.”

On November 9, 1960, the advocates for the respondents applied for execution of the decree by attachment of shares belonging to the appellant held by the Eastern Province Bus Co. (1954) Ltd. and, on November 24, on this application a prohibitory order under O. 19, r. 43, was issued attaching the shares in question. On January 18, 1961, the appellant applied to the High Court at Jinja for the prohibitory order to be set aside. In his supporting affidavit the appellant referred to the withdrawal of the attachment, and stated, *inter alia*, that:

“Pending execution of warrant of attachment settlement was reached between Shah Meghji Nathoo representing the decree-holders and Keshavji Gordhandas Pabari representing myself (my attorney) at Nairobi on or about August 6, 1960, for satisfaction of the decree in the following manner:

“Shs. 1,124/- to be paid by me on or about 8.8.60 and 17.11.60 respectively, and as to Shs. 6,000/- to be paid by Mr. Laxmidas K. Paw of Bugiri. The decree-holders relinquished their claim against me for the said sum of Shs. 6,000/- and accepted the said L. K. Paw as their debtor.

“I paid the sum of Shs. 1,124/- by two cheques made out as follows:

“Shs. 624/- cheque No. J 63205 dated 8.8.60

“Shs. 500/- cheque No. J 63211 dated 2.10.60.

“And the said L. K. Paw gave his own three promissory notes of Shs. 2,000/- each to the decree-holders and thereupon the decree-holders discharged me from the said liability and wrote a letter on the same date

to Messrs. Lawrence Long & Todd of P.O. Box 810, Nakuru, their advocates to the effect that:

“ ‘We have to advise that we have settled our account with M/s. G. P. Pabari of Jinja. Please inform M/s. Baerlein & James of Jinja to withdraw execution against the defendant. Thanking you.’ ”

The matter came before the High Court on April 5, 1961, when the learned judge refused an application by the respondent for an adjournment to enable a counter-affidavit to be filed. The hearing of the application proceeded, it being contended (a) that the decree was incapable of execution as a settlement had been reached and the court had been so informed; and (b) that the judgment-creditor had accepted a third party as his debtor instead of the judgment-debtor and that therefore the claim against the judgment-debtor could not be maintained as there had been a novation. The learned judge held that the appellant's affidavit did not clearly establish that there had been a novation; and that the statement in the respondents' advocates' letter to the court that the matter had been settled did not necessarily mean that the respondents had released the appellant from liability, but rather that the matter of the attachment on August 4, 1960, had been settled. He accordingly dismissed the application with costs.

On the appeal it was contended that the learned judge ought to have held that there had been a novation; that a settlement had been reached and notified to the court, though the terms of the settlement had been reached and notified to the court, though the terms of the settlement had not been disclosed to the court; and that accordingly the prohibitory order ought to be set aside.

We were not prepared to disagree with the learned judge's view that the appellant's affidavit was inadequate to establish that there had been a novation; and we agreed with his view that the respondents' advocates' letter of August 8, 1960, did not necessarily indicate more than that the matter of the attachment of August 4, 1960, had been settled, a view obviously shared by the court in making the order set out above for the withdrawal of the attachment. However, our principal reason for dismissing the appeal was that we considered the appellant's application was misconceived. The appellant's contention, if correct, is that the decree has been satisfied. So far as the court is concerned, however, there is no indication of this on the record, and so nothing to prevent execution proceedings issuing at the instance of the respondents, the decree-holders, r. 2 of O. 19 of the Civil Procedure Rules provides:

- “2.(1) Where any money payable under a decree of any kind is paid direct to the decree-holder or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the court whose duty it is to execute the decree, and the court shall record the same accordingly.
- “(2) The judgment-debtor also may inform the court of such payment or adjustment, and apply to the court to issue a notice to the decree-holder to show cause, on a day to be fixed by the court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly.
- “(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any court executing the decree.”

The respondents in this case have not as decree-holders certified to the court under sub-r. (1) the satisfaction of the decree either by payment or otherwise. The appellant's remedy as judgment-debtor is to inform the court under sub-r. (2) of the payment or adjustment which he alleges, and to apply for the issue of a notice to the respondents to show cause why the payment or adjustment

should not be recorded. If the appellant succeeds in having satisfaction of the decree recorded the prohibition order will lapse. As already stated, we considered the present proceedings to be misconceived; but were of opinion that it was still open to the appellant to follow the proper procedure.

Crawshaw JA: I agreed that the appeal should be dismissed on the ground that as the appellant had not followed the procedure prescribed in O. 19, r. 2 (2) the alleged adjustment of the decree could not be recognised by the court (O. 19, r. 2 (3)), with the result that the court was and still is entitled to make a prohibitory order. The letter of August 8, 1960, from the advocates for the decree-holders to the court saying “this matter has been settled” did not necessarily mean that the decree had been adjusted and did not amount to a certificate for the purposes of O. 19, r. 2 (1).

If the contents of the affidavit of the appellant of August 4, 1961, are correct, it would appear to me that the decree had been wholly adjusted, but I express no final view to that effect as it is not a question which in the circumstances we have been called upon to consider, and we did not therefore ask counsel for the respondents to argue it.

Appeal dismissed.

For the appellant:

JM Shah and MA Patel

For the respondents:

OJ Keeble

For the appellant:

Advocates: *Patel & Shah*, Jinja

For the respondents:

Hunter & Greig, Jinja

Shah Hemraj Bharmal and Brothers v Santosh Kumari w/o JN Bhola
[1961] 1 EA 679 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 December 1961
Case Number:	19/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Newbold JA
Appeal from:	HM Supreme Court of Kenya—Pelly Murphy, J

[1] Practice – Appeal – Extension of time to file notice of cross-appeal – Application to support

decision of lower court on other grounds – Over a year's delay in making application – Mistake of legal adviser – Excessive delay – Discretion – Sufficient cause – Eastern African Court of Appeal Rules, 1954, r.9 and r. 65 (1) and (3) – Rules of the Supreme Court, O.LVIII, r. 15.

[2] Practice – Pleading – Plea of undue influence – No particulars given – Application at trial for this defence to be struck out – So ordered – Evidence given – Defence restored in judgment – Case decided on issue of undue influence – Whether issue before the court – Re-trial – Civil Procedure (Revised) Rules, 1948, O. VI, r.2 and r. 3 (K.).

Editor's Summary

The appellants had sued the respondent on a guarantee alleged to have been given by her in respect of a debt owed by her deceased husband to the appellants. The respondent pleaded several defences including that she had signed the guarantee not knowing what it was and as a result of the undue influence of her husband, or the appellants or both. At the trial the judge struck out the defence of undue influence on the ground that no particulars thereof had been given in conformity with O. VI, r. 2 of the Civil Procedure (Revised) Rules, 1948, but having heard the evidence he ordered in his judgment that the defence

of undue influence be restored as he was then satisfied that the lack of particulars had not embarrassed the appellants. The judge also held that the appellants had not established that when the respondent signed the guarantee she knew the nature of the document and dismissed the claim without considering the other defences. At the hearing of the appeal the court considered an application made by the respondent six days previously, and nearly eighteen months after the appeal had been filed, for leave to support the judgment of the court below on grounds other than those relied on by that court. For the appellants it was submitted that since the defence of undue influence had been struck out, the judge was not as a matter of law entitled to restore it in his judgment and so to decide the case on that issue.

Held –

- (i) it is normally incumbent on a party who desires to support a decision of the court below on grounds other than those relied by that court, and who is out of time under r. 65 of the Eastern African Court of Appeal Rules, 1954, to make application within a reasonable time under r. 9 for an extension of time for filing notice of cross-appeal.
- (ii) in the instant case the delay in filing the application was grossly excessive; there was no question of mistake on the part of the legal adviser but merely of inordinate delay, and since no sufficient reason had been shown the application must be refused.
- (iii) as the judge had struck out the defence of undue influence early in the trial there was no such issue before the court; accordingly, the restoration of that defence in the judgment and the decision based on that issue could not stand.
- (iv) having regard to the course the proceedings took the appropriate order on the appeal would be an order for re-trial before another judge.

Appeal allowed. Re-trial ordered.

Cases referred to:

- (1) *Gatti v. Shoosmith*, [1939] 3 All E.R. 916.
- (2) *North Staffordshire Railway Company v. Edge*, [1920] A.C. 254.
- (3) *MacKenzie v. Royal Bank of Canada*, [1934] A.C. 468.
- (4) *Chaplin & Co. Ltd. v. Brammall*, [1908] 1 K.B. 233.
- (5) *Howes v. Bishop*, [1909] 2 K.B. 390.
- (6) *R. M. Khemaney v. Lachabhai Murlidhar*, [1960] E.A. 1 (P.C.).

December 19. The following judgments were read:

Judgment

Sir Alastair Forbes V-P: This is an appeal from a judgment and decree of the Supreme Court of Kenya dismissing with costs the appellants' claim against the respondent for a sum of Shs. 9,698/63 together with interest and costs.

The respondent was the wife of one Jagan Nath Bhola, now deceased. The appellants had on

November 22, 1956, obtained judgment for Shs. 11,959/38 against Jagan Nath Bhola. On March 4, 1957, the appellants filed an application for execution of the decree against Jagan Nath Bhola, and a warrant for the attachment of his movable property was issued on March 11, 1957, returnable on or before April 11, 1957. On April 2, 1957, the respondent executed a document (headed "bond", and hereinafter referred to as "the bond") whereby she purported to guarantee the repayment of the decretal amount and interest thereon by instalments as therein mentioned. Thereupon, on instructions given by the advocate for the appellants, Mr. J. J. Patel, the warrant of attachment was not executed. Two instalments, of the amounts

contemplated in the bond, were paid by Jagan Nath Bhola, who then died, and no further payments were made. In June, 1959, the appellants brought the suit on which this appeal arises, claiming from the respondent under the bond the balance of the money due from Jagan Nath Bhola under the decree against him, together with accrued interest. Paragraphs 4, 5 and 6 of the plaint pleaded:

- “4. By a guarantee dated the 2nd day of April, 1957, in writing and in consideration that the plaintiffs would give time to the said Jagan Nath Bhola for the payment of the said debt by instalments and would forbear from enforcing the decree against the said Jagan Nath Bhola, the defendant guaranteed to pay to the plaintiffs the said sum of Shs. 12,201/88 and interest thereon at the rate of six per centum per annum on the principal amount claimed in the civil suit from February 24, 1957, and/or any part thereof, in the event of default by the said Jagan Nath Bhola to pay any one instalment on the dates mentioned in the said guarantee.
- “5. The plaintiffs gave time to the said Jagan Nath Bhola for the payment of the said amount and forbore to enforce the decree on the faith of the said guarantee.
- “6. The said Jagan Nath Bhola has failed to pay Shs. 8,701/88 and the same is still unpaid.”

The respondent by her defence raised several defences. The material part of the defence reads as follows:

- “2. The plaintiffs’ suit does not lie in view of the provisions of s. 34, s. 37 and s. 92 of the Civil Procedure Ordinance Cap. 5 of the Laws of Kenya (Revised Edition), 1948.
- “3. The defendant will maintain that she is discharged altogether from liability under the alleged guarantee in view of the death of Jagan Nath Bhola which occurred on 7th day of June, 1957, and of which the plaintiffs had due notice.
- “4. The alleged guarantee referred to in para. 4 of the plaint is unenforceable as it does not give the name of the persons for whose benefit the guarantee was given and does not state whether the same was given jointly or severally or both if such was the case.
- “5. Without prejudice to the foregoing the defendant denies that she is indebted to the plaintiffs in the sum claimed or any part thereof.
- “6. No admission in regard to para. 3 of the plaint is made.
- “7. With regard to para. 4 of the plaint the defendant states that she is an illiterate woman and that the said Jagan Nath Bhola made her sign a document which she did without being explained the nature of the contents or the effects of the same and signing the same as aforesaid she was under the undue influence of her husband or the plaintiffs or both. Except as aforesaid the defendant denies each and every allegation contained in para. 4.
- “8. No admission in regard to paras. 5 and 6 of the plaint is made.”

At the trial the appellants’ advocate, after stating the issues raised by the defence, referred to O. VI, r. 2, of the Civil Procedure (Revised) Rules, 1948, which requires that in cases in which the party pleading relies on, *inter alia*, undue influence, particulars with dates shall be stated in the pleading, and applied for para. 7 of the defence to be struck out. The learned judge ruled:

“In my opinion the allegation of undue influence in para. 7 of the defence should have been supported with particulars. No such particulars have been given in the pleading and I, therefore, order that para. 7 of the defence be struck out as embarrassing to the plaintiff.”

Counsel for the respondent applied for leave to appeal against this ruling, but the application was refused on the ground that there was no right of appeal at that juncture, and the trial proceeded on the basis that para. 7 of the defence had been struck out.

For the appellants evidence was given by a Jayantilal Shah, a partner in the appellant firm, and a Kantilal Patel, a clerk in the office of Messrs. J. J. Patel, the appellants' advocates. Mr. Shah gave evidence of an alleged interview at the appellants' shop on March 9, 1957, between himself and Jagan Nath Bhola and the respondent, at which he stated that the respondent joined Jagan Nath Bhola in asking him (Shah) to withdraw the attachment and allow payment of the judgment debt by instalments on the strength of the respondent's guarantee. Shah said in cross-examination that the respondent spoke in Punjabi and that he understood that language a little. He said that he finally agreed to the proposal, and Jagan Nath Bhola paid him Shs. 1,000/- forthwith. Thereafter, following the interview, according to Shah, he and Jagan Nath Bhola, but not the respondent, went to the officers of Messrs. J.J. Patel and gave instructions for the preparation of the bond. Kantilal Patel's evidence was to the effect that Jagan Nath Bhola and the respondent came to the office of Messrs. J.J. Patel for the purpose of signing the bond; that he handed the draft bond to Jagan Nath Bhola who read and explained it to the respondent in Punjabi, taking about 15 to 20 minutes to do so; and that the respondent then signed the bond in his presence and he attested her signature. It is to be noted that, according to the record, Kantilal Patel was not asked whether or not he understood Punjabi, and did not say that he did not understand it.

The respondent alone gave evidence on her own behalf. She stated that she was unable to read English except to sign her name; that she went on one occasion with Jagan Nath Bhola to the appellant's shop, from which she and Jagan Nath Bhola went to an office where she was presented with a document and asked to sign; that the document was never explained to her; that her business interests were looked after by her husband in whom she had complete confidence and trust; that he told her

"there has arisen some trouble in my dealings, so come and put your signature";

and that she signed willingly because he asked her to do so. She denied any interview with Shah at which she pleaded with him to accept payment of her husband's debt by instalments.

At the close of the case for the respondent, Mr. R.N. Khanna, who represented the respondent at the trial, is recorded as saying:

"Paragraph 7 of defence—discretion to reinstate."

There is no record of the reply (if any) made by the appellants' advocate to this submission.

In his judgment the learned judge, after stating the bare facts leading up to the case, said:

"In para. 7 of the defence filed it was pleaded that the defendant is an illiterate woman; that she signed the guarantee because her husband Jagan made her do so; that she did so without having had the contents explained to her (and, inferentially, without understanding the nature of the document); and that, in doing this, she was acting under the undue influence of her husband or the plaintiff or both.

"At the hearing, Mr. Patel for the plaintiffs, applied (for) para. 7 of the defence (to) be struck out because the particulars of the undue influence were not given as is required by O. VI, r. 2 of the Civil Procedure Rules, and argued that he was thereby embarrassed. Having heard Mr. Khanna

for the defendant on this submission, I ordered that the paragraph be struck out. In making that order I was swayed by the fact that the allegation of undue influence pleaded was made against the plaintiffs as well as against the husband. Having heard the evidence however, it is clear that there is no allegation of undue influence against the plaintiffs. In fact, the defendant denies that she was present at or took part in the discussion at the plaintiff's shop of which Shah gave evidence and she says that she never had any meeting with Shah or any other person representing the plaintiffs. In the result, I have come to the conclusion that the plaintiffs have not been embarrassed by the lack of greater particularity in the pleading, and I therefore order that para. 7 of the defence, omitting therefrom the words 'or the plaintiffs or both', be restored."

The learned judge then referred to the evidence given and continued:

"With this conflict in the evidence it is necessary to consider the reliability of that given by Shah for the plaintiffs. It is obvious that the date of the alleged visit to the plaintiff's shop by Jagan and his wife for the purpose of having the attachment withdrawn could not have been on March 9, because at that date the warrants had not been issued. Yet, Shah was certain of the date by reference to an entry in his books of account showing the receipt of Shs. 1,000/- from Jagan. In cross-examination Shah agreed that when Santosh (the defendant) spoke, she spoke in Punjabi. I am satisfied that he does not understand that language. Shah said that, when he and Jagan went to Messrs. Patel's office, the defendant did not accompany them. He gave no explanation for this. No person from Messrs. Patel's office gave evidence as to what transpired when Shah and Jagan visited their office to give instructions with regard to the document evidencing the guarantee. Shah said that he instructed Mr. J. J. Patel. The evidence given by Messrs. Patel's clerk as to Jagan explaining the guarantee to the defendant is by no means conclusive in that the witness does not understand the Punjabi language.

"In my judgment the plaintiffs have not discharged the burden of proof laid on them in regard to the alleged interview in the plaintiff's shop. I have come to the conclusion that the defendant was never present at such an interview. Similarly, the plaintiffs have not, in my opinion, established the fact that when the defendant signed the guarantee in Messrs. Patel's office she knew the nature of the document.

"In these circumstances is the defence of undue influence established? (The defence is to a certain extent a pleading of non est factum.) There is no general rule of universal application which throws on the husband or on the person who is suing the wife the onus of disproving an allegation of undue influence. But in my opinion the facts of this case in so far as I have been able to ascertain them brings it within the scope of *Chaplin v. Brammall*, [1908] 1 K.B. 233 and, on the authority of that case, I have come to the conclusion that the guarantee is unenforceable against the defendant. Moreover, it would appear that a creditor must enquire into the facts under which a wife becomes surety to him for her husband. In the instant case, on the evidence which I have accepted, the creditor made no such enquiry and I have, therefore, come to the conclusion that on that ground also the guarantee is unenforceable against the defendant."

Judgment was accordingly given for the respondent with costs, the learned judge stating that in view of his decision it was not necessary for him to consider the other issues raised, which he stated to be:

"(i) Is the suit barred because of the provisions of s. 34, s. 37 and s. 92 of the Civil Procedure Ordinance?

- “(ii) Is the defendant discharged from liability under the guarantee by reason of the death of Jagan?
- “(iii) Is the guarantee unenforceable because it does not give the name of the person for whose benefit it was given and because it does not state whether it was given jointly and severally?”

A number of grounds of both law and fact are set out in the memorandum of appeal, which it is not necessary to set out here in detail. The memorandum of appeal challenged the whole of the learned judge's decision, but did not state the precise relief sought by the appellants on the appeal. The memorandum of appeal was filed on April 4, 1960. On November 8, 1961, the respondent filed an application seeking leave to support the decision of the Supreme Court on grounds other than those relied upon by that court.

At the commencement of the hearing of the appeal the court intimated to the parties that at that stage, and without having heard argument, it appeared to the court that since the learned judge had first struck out para. 7 of the defence, so that there was no issue on that paragraph before the court, and then subsequently in his judgment restored it and decided the case upon it without considering the other defences, the appropriate order on the appeal would be an order for a re-trial; and that unless the appellants were asking for more than a re-trial, the court proposed to call on the respondent to satisfy it that a re-trial should not be ordered.

After an adjournment for counsel to consider the position, Mr. Nazareth, who appeared for the appellants, informed the court that the view of Mr. D. N. Khanna, counsel for the respondent, was that there should not be a re-trial and that he (Mr. Nazareth) was prepared to accept that, but if the court thought an order for a re-trial was the only order to be made in the matter he would agree. On being asked whether he was asking for more than a re-trial, Mr. Nazareth said that he would press for judgment for the amount claimed in the plaint. The hearing of the appeal accordingly proceeded in the ordinary way.

Before hearing argument on the merits, the court considered the respondent's application, under r. 65 (3) of the Eastern African Court of Appeal Rules, 1954, for leave to support the judgment of the court below on grounds other than those relied on by that court.

The material part of r. 65 reads:

- “65. (1) It shall not ordinarily be necessary for a respondent to give notice of appeal, but, if the respondent intends, upon the hearing of the appeal, to contend that the decision of the court below should be . . . affirmed on grounds other than those relied upon by that court, he may, at any time after receiving notice of appeal, but not more than seven days after service on him of the record of appeal, give notice of cross-appeal, specifying the grounds thereof, to the appellant . . . and shall file within the like period four copies of such notice.
- “(2)
- “(3) If the respondent fails to give such notice within the time prescribed, he shall not be allowed, except by leave of the court, to contend on the hearing of the appeal that the decision of the court below should be . . . affirmed on grounds other than those relied upon by that court; but the Court of Appeal may in its discretion hear any such contention and may, if it thinks fit, impose terms as to costs, adjournment or otherwise.”

Rule 9 of the rules provides *inter alia* that:

- “The court shall have power for sufficient reason to extend time . . . for taking any step in or in connection with any appeal, notwithstanding that the time limited therefor may have expired . . .”

Under s. 14 of the Eastern African Court of Appeal Order in Council, 1950, a single judge of the court may exercise any power vested in the court not involving the decision of the appeal but any decision of such single judge may be varied or reversed by the court.

We are of the opinion that under these provisions it is normally incumbent on a party who desires to support a decision of the court below on grounds other than those relied on by that court, and who is out of time under r. 65, to make application within a reasonable time under r. 9 for extension of time to file notice of cross-appeal. If the application for extension of time is refused by a single judge, the matter can be re-considered by the court, either before or at the hearing of the appeal. The matter is one of discretion, and we do not wish to lay down an invariable rule; but rules are made to be observed, and where there has apparently been excessive delay the court requires to be satisfied that there is an adequate excuse for the delay or that the interests of justice are such as to require the indulgence of the court upon such terms as the court considers just.

In the instant case the delay in filing the application was grossly excessive. The appeal was filed on April 4, 1960, and time for filing notice of cross-appeal therefore expired on April 11, 1960. The application was not filed till November 8, 1961, that is six days before the date fixed for the hearing, and after a delay of nearly eighteen months. No excuse whatever was offered for this delay, it merely being stated that the respondent's legal adviser read the record for the first time on November 7, 1961, and that the failure to file notice within the prescribed time was due to no fault of the lay client. It is to be noted that the same firm of advocates represented the respondent at the trial and on the appeal. It was argued that the lay client should not be penalised for the forgetfulness or default of her legal advisers. In *Gatti v. Shoosmith* (1), [1939] 3 All E.R. 916 at p. 919, the Master of the Rolls, in considering an application for extension of time under O. LVIII, r. 15, of the English Rules of the Supreme Court, said:

“ . . . in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say ‘may be’ because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case.”

It is to be noted that the discretion of this court under r. 9 of the Eastern African Court of Appeal Rules, 1954, is rather more restricted than the discretion of the Court of Appeal in England under O. LVIII, r. 15, of the English Rules of the Supreme Court. The discretion under the latter is unfettered, while under the former “sufficient cause” must be shown. Mistakes of a legal adviser may, however, amount to “sufficient cause” under the East African rule.

In the instant case there was no question of mistake on the part of the legal adviser, but merely of inordinate delay. Further, the issues raised in the proposed cross-appeal were two of the issues which the learned judge had declined to deal with in view of his decision on para. 7 of the defence. We were of the opinion that, if the case fell to be decided on these issues, it was not appropriate for this court to consider them in the first instance. One at least

involved questions of fact. In *North Staffordshire Railway Company v. Edge* (2), [1920] A.C. 254 at p. 263 Lord Birkenhead, L.C., said:

“But I desire to draw attention to a consideration which in my view is both more general and more important. The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of argument it is the invariable practice of appellate tribunals to require that the judgments of the judges in the courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.”

We do not desire to lay down a rule that this court will never consider an issue which has not been considered by the court below. Each case must depend on its own facts. But in the instant case we were of the opinion that it was desirable that the issues in question should have been considered by the court below before being considered by this court; and we considered that no sufficient reason had been shown for the delay in filing the cross-appeal. We accordingly refused the application to support the decision of the court below on grounds other than those relied on by that court; and we ordered that the appellants should have the costs of the motion in any event, the hearing time being forty-five minutes.

On the appeal Mr. Nazareth argued that since para. 7 of the defence had been struck out, as a matter of law the learned judge was not entitled to restore it in his judgment and decide the case on the issue of undue influence; and that therefore the learned judge’s decision could not stand. He further argued at length that the learned judge had wrongly laid on the appellants the burden of establishing that there was not undue influence; and that the learned judge’s findings of fact were unjustified. He contended that the case for the appellants had been proved and that judgment should be entered for the appellants for the amount claimed with interest and costs.

Mr. Khanna for the respondent argued that undue influence had been proved; and that there was evidence to support the learned judge’s findings of fact and that the criticisms of the learned judge’s reasoning did not go far enough to entitle this court to find the opposite; that the learned judge was right in saying that the intended surety being the wife, there was a duty on the appellants to enquire into the facts under which she became surety for her husband; that the case was not one in which a re-trial could properly be ordered and that Mr. Nazareth on behalf of the appellants had agreed there should not be a re-trial and accordingly the case ought to be finally determined by this court. He conceded that the onus was on the respondent to establish the defence of undue influence, but submitted that on the facts found by the learned judge that onus was discharged. As regards restoration of the issue of undue influence, Mr. Khanna submitted that all facts were before the court and that no prejudice was caused by restoration of the issue; that the issue was restored before judgment and that the learned judge was merely re-affirming the reinstatement in his judgment; that if there was doubt as to this, an inquiry should be addressed to the learned judge; and that the issue of undue influence should not have been struck out in the first place. He conceded that if the learned judge had only restored the issue of undue influence in the judgment, he could not resist an order for a re-trial; but contended that in that case he

should be awarded costs since the issue should not have been struck out in the first place.

Mr. Nazareth in reply did not agree that he had consented to there being no order for a re-trial; and he stated that his instructions were that restoration of the issue of undue influence was not ordered before judgment was delivered.

In the view I take of the matter, for a number of reasons the only proper order for this court to make is an order for a re-trial. In the first place, as regards restoration of the issue of undue influence, the record is clear that the issue was only restored in the judgment. There is no suggestion in the note of the closing addresses of counsel that any order for restoration was made at that time; and the words in the judgment are "I therefore order that para. 7 of the defence . . . be restored". Since the record is clear I see no reason to ask the learned judge for clarification. It is impossible to say what course the trial would have taken had this issue been before the court throughout. The course of the examination and cross-examination of witnesses might have been different, and, as was suggested by Mr. Nazareth, the appellants might have seen fit to call other witnesses, for instance Mr. J. J. Patel. With respect, I think that the restoration of the issue of undue influence at that stage cannot be sustained and that therefore the decision based on that issue cannot stand. I have already indicated that we were not prepared to deal with the other issues which had not been considered in the Supreme Court, and accordingly, if the decision on the footing of undue influence cannot stand, a re-trial on those other issues is inevitable. So far as the issue of undue influence is concerned, the question whether or not para. 7 of the defence had been correctly struck out in the first place was not properly before us, but it is implicit in the learned judge's restoration of the issue that he came to the conclusion that it ought not to have been struck out. In view of this, I think, the issue of undue influence ought to be open to the respondent on the re-trial also, subject to any objection the appellant may see fit to raise. I will therefore not express an opinion on the adequacy of para. 7 of the defence, but would merely note (*a*) that the paragraph does contain some particulars of the undue influence alleged; and (*b*) that if the appellants regarded the particulars given as inadequate and thus embarrassing to them, they should have requested further and better particulars, and if these were not supplied to their satisfaction, have applied under O. VI, r. 3, of the Civil Procedure (Revised) Rules, 1948, instead of waiting till the trial and then applying to have the defence struck out.

We were invited by Mr. Khanna to dispose of the issue of undue influence on the appeal even if a re-trial was ordered on the other issues. This invitation was based on the assumption that all the available facts were before the court, that the learned judge had made a supportable finding on those facts, and that the appellants had consented through Mr. Nazareth to this issue being disposed of.

I have set out Mr. Nazareth's reply to the court at the opening of the appeal, and I do not think it is to be construed as a consent to the issue of undue influence being finally disposed of on the facts now before the court. In any event I do not think it would be proper for the court to attempt to do so. As I have already said, the whole course of the trial might have been different had the issue been before the court throughout; and as regards the learned judge's findings on the evidence which was before the court, I am not satisfied that the reasons he gave necessarily justified the inferences he drew. In one instance at least he appears on the record to have misdirected himself—that is, where he says:

"The evidence given by Messrs. Patel's clerk as to Jagan explaining the guarantee to the defendant is by no means conclusive in that the witness does not understand the Punjabi language."

This statement may or may not be true, but, as I have already pointed out, the witness, on the record, does not say he did not understand the Punjabi language. He apparently was not asked whether he did or did not understand that language. This is one of the matters on which the evidence might have been different had the issue of undue influence not been struck out. In view of my conclusion that there should be a re-trial of the whole matter, I will make no further comment on the facts.

As regards the law, I think, with respect, that the learned judge did take a wrong view of the onus of proof, especially where he says:

“Similarly, the plaintiffs have not, in my opinion, established the fact that when the defendant signed the guarantee in Messrs. Patel’s office she knew the nature of the document.”

It is clear on the authorities, and was conceded by Mr. Khanna, that the onus lies on a wife to establish a defence of undue influence. In *MacKenzie v. Royal Bank of Canada* (3), [1934] A.C. 468 at p. 475 their lordships of the Privy Council said:

“The view taken by the appellate division that a wife does not fall within the class of ‘protected’ persons in respect of whom in certain relationships there is a presumption of undue influence, is clearly right, and is supported by the authorities cited in their judgment.”

Their lordships continued:

“It may be true that in some cases it is easy for the wife to discharge the onus which lies on her as on every one else outside the protected class to show that a particular contract was, in fact, procured by the undue influence of her husband.”

It was argued in the instant case that Hindu wives as a class normally regard themselves as subject to the directions of their husbands. This may be so, and, if so, is no doubt a factor to be taken into account in considering whether the onus on the wife has been discharged; but the onus in the first instance is on the wife.

The learned judge relied on the case of *Chaplin & Co. Ltd. v. Brammall* (4), [1908] 1 K.B. 233; and on the proposition, apparently taken from Halsbury’s Laws of England (3rd Edn.), Vol. 18, p. 497, that

“it would appear that a creditor must enquire into the facts under which a wife becomes surety to him for her husband”.

The authority cited in Halsbury for this proposition is *Howes v. Bishop* (5), [1909] 2 K.B. 390, but, as I read it, that case does not support the proposition, at least not without qualification. The application of the proposition, and of *Chaplin v. Brammall* (4), and other cases cited to us, depends so much upon the particular facts found that I do not think that any useful purpose is served by discussing them in vacuo before a finding of fact on the re-trial.

As I have indicated, I consider there should be a re-trial ordered on this appeal. I am not unmindful of the comments of their lordships of the Privy Council in *R. M. Khemaney v. Lachabhai Murlidhar* (6), [1960] E.A. 1 (P.C.) as to the matters to be borne in mind before a re-trial is ordered, but in this case I consider the whole course of the proceedings in the court below so unsatisfactory that I do not think that this court is in a position to reach a just decision on the material before it. I would accordingly set aside the judgment and decree of the Supreme Court and remit the case to the Supreme Court for re-trial before a different judge. As regards para. 7 of the defence, I would order that the appellants be at liberty, if they be so advised, to apply to the respondent

within twenty-one days of this judgment for such further and better particulars of the allegation of undue influence as they may deem necessary. Thereafter, all matters pertaining to the re-trial should be in the discretion of a judge of the Supreme Court.

As regards costs, I think the costs of the first trial should be in the discretion of the learned judge on the re-trial. So far as the costs of the appeal are concerned, the appellants have been successful in having the decision of the Supreme Court set aside and are, I think, entitled to the costs of the appeal, subject, however, to this: that had the appellants accepted the course suggested by the court at the commencement of the appeal, the hearing time would have been substantially reduced. The appellants chose to press for judgment in their favour, but failed to obtain it. I would estimate the additional time involved in the course they adopted at one day's hearing, and would order that the appellants be not entitled to recover the costs of that day's hearing. I would not certify costs for two counsel. The order that the appellants should have the costs of the motion to admit the cross-appeal of course stands.

Sir Kenneth O'Connor P: I agree and have nothing to add. There will be an order as proposed by the learned Vice-President.

Newbold JA: I also agree.

Appeal allowed. Re-trial ordered.

For the appellants:

JM Nazareth QC and VM Patel

For the respondent:

DN Khanna

For the appellant:

Advocates: *JJ & VM Patel*, Nairobi

For the respondent:

DN & RN Khanna, Nairobi

C Popat & Company v Hussein Brothers and others
[1961] 1 EA 690 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	19 October 1961
Case Number:	300/1958
Before:	Miles J

[1] *Practice – Evidence – Examination of witness abroad and outside jurisdiction – Issue of commission*

or letters of request – Application by summons in chambers – Civil Procedure (Revised) Rules, 1948, O. XXVII, r. 1; r. 2, r. 20; O. XXIX, r. 10; O. XXX, r. 5. (K.).

Editor's Summary

The second defendants applied by summons in chambers under O. XXVII r. 2, r. 4 and r. 5 of the Civil Procedure (Revised) Rules, 1948, for the issue of a commission or letters of request for the examination of a witness in India. A preliminary objection was taken on behalf of the third defendant that the application was incompetent as it was not by motion. It was contended that the provisions of r. 2 whereby an order for the issue of a commission for the examination of a witness may be made by the court on application supported by affidavit was limited to r. 1 only.

Held – the provisions of O. XXVII, r. 2, are of general application and are not limited to r. 1; accordingly the application was competent.

Preliminary objection overruled.

No cases referred to in judgment

Judgment

Miles J: The wording of this order is by no means clear but in my opinion r. 2, of O. XXVII is a general provision and is not limited to r. 1 as is contended on the part of the third defendant. It provides that the order would be made by the court on application supported by affidavit. This is a general provision in stating how application ought to be made. It is conceded that r. 20 of the Order should be worded “under this Order” as is done in other cases, namely O. XXIX, r. 10, and O. XXX, r. 5, if all applications under the Order could be made by summons in chambers. But if r. 2 is taken as a general provision governing all applications and enabling the court to make orders for commissions generally this objection would not apply. I hold that the technical objection fails and that the application is competent.

Preliminary objection overruled.

For the plaintiff:

JJ Patel

For the first defendant:

SM Akram

For the second defendant:

PL Maini

For the third defendant:

DN Khanna

For the plaintiffs:

Advocates: *JJ and VM Patel*, Nairobi

For the first defendant:

Akram and Esmail, Nairobi

For the second defendant:

Maini and Patel, Nairobi

For the third defendant:

DN and RN Khanna, Nairobi

Simoni Petero Zira Bamuzale v Andrew Corret and another
[1961] 1 EA 691 (HCU)

Division: HM High Court of Uganda at Kampala
Date of judgment: 7 November 1961
Case Number: 637/1961
Before: Bennett J

[1] *Practice – Pauper – Application to sue as pauper – Procedure to be followed by court when application made – Civil Procedure Rules, O. 30, r. 4, r. 5 and r. 6; O. 46, r. 1, r. 2, r. 3 and r. 4 (U.) – Uganda Order in Council, 1902, s. 15 (2A) (U.).*

[2] *Pauper – Practice – Application to sue as pauper – Procedure to be followed by court when application made – Civil Procedure Rules, O. 30, r. 4, r. 5 and r. 6; O. 46, r. 1, r. 2, r. 3 and r. 4 (U.) – Uganda Order in Council, 1902, s. 15 (2A) (U.).*

Editor’s Summary

The applicant applied under O. 30 of the Civil Procedure Rules to sue as a pauper. Rule 4, r. 5 and r. 6 of this Order provide that when such an application is presented in proper form, the court shall consider it and, if it so decides, may examine the applicant regarding the merits of the claim and his property; if after consideration and examination the court concludes that the application should not be rejected on any of the grounds set out in r. 5, the court must then fix a day for receiving evidence of pauperism of which notice must be given to the proposed defendants and the attorney-general. When the application came before the High Court, the file contained no record that a judge had considered and made any determination upon the preliminary matters set out in Rule 4, r. 5 and r. 6, but contained a note signed by the deputy registrar that the court saw no reason to reject the application.

Held –

- (i) reading r. 4, r. 5 and r. 6 of O. 30 together, before a day can be fixed for receiving evidence of pauperism, there must be a judicial determination *inter alia* that the application is in order and that the facts show a cause of action, and that *prima facie* the applicant is a pauper.
- (ii) the expression “court” in the Civil Procedure Ordinance and Rules with reference to the High Court must mean a judge since it is plain from s. 15 (2A) of the Uganda Order in Council, 1902, that the court, to be fully constituted, must be presided over by a judge.

- (iii) the registrar had no power to exercise the powers of the court under O. 30, r. 4, r. 5 and r. 6 of the Civil Procedure Rules and the applicant must submit his application again.

Order for re-submission of the application.

No cases referred to in judgment

Judgment

Bennett J: This is an application to sue as a pauper under O. 30 of the Civil Procedure Rules. Order 30, r. 4, r. 5 and r. 6 require that when an application of this nature is presented and is in proper form, the court shall consider it and may, if it thinks fit, examine the applicant regarding the merits of the claim and the property of the applicant. If, after consideration of the application and such examination of the applicant as the court considers necessary, the court comes to the conclusion that the application should not be rejected on any of the grounds set out in O. 30, r. 5, the court must then fix a day

for the receiving of evidence in proof of pauperism of which at least 10 days' clear notice must be given to the proposed defendants and to the attorney-general.

Reading r. 4, r. 5 and r. 6 together, it is plain that before a day can be fixed there must be a judicial determination that the application is in order, that the facts alleged by the applicant show a cause of action, that the applicant has not disposed of any property within two months before the presentation of the application to enable him to apply as a pauper, that the applicant has not entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in the subject-matter and that, *prima facie*, the applicant is a pauper.

There is nothing on the court file to indicate that this application has ever been the subject-matter of a determination either by the court or by any of its officers except the notice of the application itself which is signed by the deputy registrar and which recites: "whereas the court sees no reason to reject the application". There is certainly no record in the file of any determination by a judge and, if there has been any determination at all, it must have been by the registrar or one of his assistants. The expression "court" is defined in s. 2 of the Civil Procedure Ordinance as meaning "any court exercising civil jurisdiction other than a native court". The expression "court" when used in the Ordinance and Rules with reference to the High Court must mean a judge since it is plain from s. 15 (2A) of the Uganda Order in Council, 1902, that the court, to be fully constituted, must be presided over by a judge.

Order 46, r. 6 provides that for the purpose of r. 1, r. 2, r. 3 and r. 4 of that Order the registrar shall be deemed to be a civil court. However, in my opinion, the functions of the court under O. 30 do not fall within the purview of r. 1, r. 2, r. 3 and r. 4 of O. 46. I think r. 3 of O. 46 was intended to apply only to formal steps and interlocutory applications in suits. An application to sue as a pauper is not a suit and does not become a suit until leave has been given to institute proceedings as a pauper. This follows by implications from O. 30, r. 8 which provides that where the application is granted "it shall be deemed the plaint in the suit."

In these circumstances I am of the opinion that the registrar had no power to exercise the powers of this court under O. 30, r. 4, r. 5 and r. 6 and that the application should have been presented to a judge for a determination as to whether or not to reject the application, before notice was given to the proposed defendants.

Since a necessary step in the procedure has been omitted, the applicant must start again. I therefore give leave to the applicant to re-submit his application so that it can be presented to a judge for consideration under O. 30, r. 4 and r. 5. I do not consider that I can award costs to the proposed defendants at this stage. However, should the applicant be dispaupered, different considerations may arise. In that event liberty is given to the respondents to apply for costs.

Order for re-submission of the application.

For the applicant:

SH Dalal

For the first respondent:

G Singh

For the second respondent:

YV Phadke

For the applicant:

Advocates: *Haque Dalal & Singh*, Kampala

For the first respondent:

Singh & Treon, Kampala

For the second respondent:

Parekhji & Co, Kampala

Santana Fernandes v Kara Arjan & Sons and Two others
[1961] 1 EA 693 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	17 October 1961
Case Number:	55/1961
Before:	Mosdell J

[1] *Practice – Joinder of defendant – Application by joint tortfeasors – Application opposed by plaintiff – Additional defendant joined by order of court – Whether court can order joinder despite plaintiff’s opposition – Rules of the Supreme Court, 1875, O. XVI, r. 17 – Indian Code of Civil Procedure, 1908, s. 32 and O. 1, r. 10 (2).*

Editor’s Summary

The plaintiff, on behalf of himself and his wife as dependants of their deceased son, sued for damages pursuant to the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap. 360. It was alleged that the son died as a result of a collision between the lorry in which he was travelling and another lorry belonging to the first defendant and driven by the second defendant. Deceased was travelling in a lorry owned by the East African Transport Co. Ltd., and driven by one Selemani. The third defendant was joined as a defendant by order of the court on the application of the first and second defendants but was not served with notice of the application for joinder and did not appear at the hearing thereof. It was common ground that the plaintiff opposed this application. At the trial counsel for the third defendant raised, *inter alia*, two preliminary points, first, that the whole cause of action in so far as it concerned the third defendant was the result of the direction of the court compelling the plaintiff against his will to plead and claim relief against this defendant; secondly, that assuming (while denying) that the first and second defendants and the third defendant were joint tortfeasors, the plaintiff was entitled at his option to sue either of them and could not be compelled to join the other. The trial judge overruled these objections and said he would state his reasons later. The case proceeded and at the end of the plaintiff’s case counsel for the third defendant successfully submitted that his clients had no case to answer.

Held –

(i) a defendant cannot be added under O. 1, r. 10 (2) of the Indian Code of Civil Procedure, 1908, even if he be a willing party, in the fact of opposition from the plaintiff in a suit in tort. *Horwell v. London General Omnibus Co. Ltd. re London Tramways Co. Ltd.* (1877), 2 Ex. D. 365, followed.

(ii) there was no evidence against the third defendant.

Submission of the third defendant upheld.

Cases referred to:

(1) *Jummane s/o Karam Mafud v. B.P. Shell Limited*, Tanganyika High Court Civil Case No. 22 of 1959 (unreported).

(2) *Maniben Khushalbai Mistry v. Salumu Mwitanga and Another*, Tanganyika High Court Civil Case No. 27 of 1960 (unreported).

(3) *Winifred Roberts v. John Sinclair*, Tanganyika High Court Civil Case No. 116 of 1960 (unreported).

(4) *Horwell v. London General Omnibus Co. Ltd. re London Tramways Co. Ltd.* (1877), 2 Ex. D. 365.

(5) *Har Narain Singh v. Kharag Singh and Another* (1887), 9 All. 447.

(6) *Amon v. Raphael Tuck and Sons, Limited*, [1956] 2 W.L.R. 372; [1956] 1 All E.R. 273.

(7) *Rajit Ram v. Katesar Nath* (1896), 18 All. 396.

Judgment

Mosdell J: This is a claim by the plaintiff for damages under the provisions of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap. 360, on behalf of himself and his wife Lily Fernandes as dependants of their son Antonio Fernandes deceased. The circumstances giving rise to the claim arose out of an accident on the Dar-es-Salaam/Bagamoyo Road at a point some five miles from Dar-es-Salaam.

The following facts are not in dispute. On May 15, 1960, at about 10 a.m. a lorry registration number DSN 53 was proceeding towards Bagamoyo. The lorry belonged to the East African Transport Company Limited and was driven by one Selemani Waziri. As passengers in this vehicle were twelve men and seven girls, all Goans, who were going to a picnic at Kunduchi. Proceeding in the opposite direction was a lorry registration number LD 2259 belonging to the first defendants and driven by the second defendant, Juma Malembe, which was loaded with sand. At a point some five miles from Dar-es-Salaam on or near a bridge over the Mulalakuwa River the two vehicles collided. The offside sideboard of lorry DSN 53 and part of the floor of its body was ripped away and its tailboard dislodged. Several of the passengers in the lorry DSN 53 were thrown out and received injuries, one of whom was the son of the plaintiff, Antonio Fernandes, who received injuries from which he subsequently died.

Before dealing with the evidence in this case it is necessary to refer to some preliminary points of law raised by Mr. Beynon for the third defendant, who was added as defendant to the suit on the application of the first and second defendants by order of this court dated August 17, 1961. The third defendant was not served with a notice of the application to join it and did not appear at the hearing thereof. The plaintiff opposed the application. I made the order adding the third defendant in view of the previous decisions of this court, namely by Simmonds, J., in *Jummane s/o Karam Mafud v. B.P. Shell Limited* (1), Tanganyika High Court Civil Case No. 22 of 1959 (unreported), the interlocutory judgment of Law, J., in *Maniben Khushalbai Mistry v. Salumu Mwitanga and Another* (2), Tanganyika High Court Civil Case No. 27 of 1960 (unreported), and my own interlocutory judgment in *Winifred Roberts v. John Sinclair* (3), Tanganyika High Court Civil Case No. 116 of 1960 (unreported).

In the written statement of defence of the third defendant the preliminary points which were raised were:

- “(a) The whole cause of action in so far as it relates to and concerns the defendant company is the result of the direction of this honourable court dated August 17, 1961, compelling the plaintiff against his will to plead and claim relief against this defendant company.
- (b) The said direction of this honourable court was adverse to the interest of the defendant company and was made without notice to it and without affording it any opportunity of being heard.
- (c) This honourable court in any event had no jurisdiction to make the direction aforesaid, compelling the plaintiff to introduce a new cause of action against the defendant company, to make or purport to make and verify as true to his knowledge and belief the necessary averments of fact and to prosecute a claim for relief which he does not wish to prefer.
- (d) Assuming (while denying) that the first and second defendants and the defendant company were joint tortfeasors, the plaintiff is entitled at his option to sue either of them and cannot be compelled to join the other.”

After hearing argument from Mr. Beynon for the third defendant, Mr. Dodd for the first and second defendants, and Mr. Fraser Murray for the plaintiff, I ruled that the addition of the third defendant was in order and stated I would give my reasons later, and the trial proceeded. At the end of the plaintiff's case a submission was made that the third defendant had no case to answer. This submission was upheld. The third defendant was awarded costs on the higher scale and for two counsel. However, during the course of the trial it became painfully apparent that such addition should never have been made, and I find myself in the position now not of having to give reasons why the third defendant was properly added but, on the contrary, reasons why I think the third defendant should never have been added as defendant to this suit; but before I give these reasons I must give the reason why I held that there was no case for the third defendant to answer and why the third defendant was dismissed from the suit. The reason is a simple one, namely, that there was not a scintilla of evidence extracted from the plaintiff's witnesses that the driver of the lorry DSN 53 was wholly or even partially to blame for the accident. I put Mr. Beynon to his election and he agreed to abide by my ruling and if it were against him to call no evidence. In the event I upheld his submission.

In view of the turn of events at the trial, it is unnecessary for me to deal with some of the points raised by Mr. Beynon, namely, as to whether my order of August 17, 1961, was, *res judicata*, so far as the third defendant was concerned, whether such an order could be made in the absence of the party sought to be added, and whether my discretion was properly exercised; but I must, I think, in order to clear the air a little give the reasons why I resile from my previous decisions that the third defendant should be and was properly joined respectively. I am indebted to Mr. Beynon for his argument, which must have been the fruit of detailed and protracted research. He cited two cases which had not been previously brought to my notice, namely, *Horwell v. London General Omnibus Company Limited re the London Tramways Company Limited* (4) (1877), 2 Ex. D. 365, and *Har Narain Singh v. Kharag Singh and Another* (5) (1887), 9 All. 447. The former case is of particular persuasive authority because it was a case of tort and the facts were very similar to those in the instant case. It was an action for tort in respect of injuries sustained by the plaintiff through the defendant's negligence, and the defendant obtained an order under O. 16, r. 17 of the Judicature Act, 1875, that a third party who, it was alleged, through its negligence had caused the injury, should be added as defendant. It was held by Cockburn, C.J., Kelly, C.B., and Bramwell, L.J. (Brett, L.J., dissenting) in the Court of Appeal, reversing the decision of the Exchequer Division, that the defendant was not entitled to have such third party made a party to the action. Order 16, r. 17 of the then current Rules of the Supreme Court in England is similar in terms to O. 1, r. 10 of the Indian Code of Civil Procedure. The former reads as follows:

"Where a defendant is or claims to be entitled to contribution or indemnity or any other remedy or relief over against any other person, or where from any other cause it appears to the court or a judge *that a question in the action* should be determined not only as between the plaintiff and the defendant but as between the plaintiff, defendant and any other person or between any or either of them, the court or a judge may on notice being given to such last-mentioned person make such order as may be proper for having the question so determined."

Order 1, r. 10, sub-r. (2) of the Indian Code of Civil Procedure reads as follows:

"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined whether as

plaintiff or defendant be struck out, and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

The statement of claim claimed that the plaintiff was a passenger on an omnibus of the defendant, and whilst the omnibus was proceeding along the Walworth Road the defendant by its servant, the driver, so negligently drove the horses that the omnibus came into collision with a van standing by the side of the road, and in consequence of the collision the plaintiff was thrown from the omnibus and severely injured. The statement of defence contained a denial of the negligence and also a statement that the accident could not have been avoided by any reasonable care of the defendant but was due to the imperfect state in which the rails of the London Tramways Company Limited were kept for which the latter Company was responsible. On December 15, 1876, the defendant applied for and obtained a Master’s order to join the London Tramways Company Limited as a third party to the action under O. 16, r. 17 of the Judicature Act, 1875. In support of the application for the order an affidavit was made on behalf of the defendant stating that the case for the defendant was that the collision took place through the negligence of the London Tramways Company Limited in not keeping its tramway lines in the Walworth Road in proper repair. On December 19, 1876, the order of December 15, was served on the London Tramways Company Limited together with a notice that if the company wished to dispute its liability it must cause an appearance to be entered within eight days after service of the notice, and in default of so appearing it would not be entitled in any future proceedings between the defendant and itself to dispute the validity of the judgment in the instant action whether obtained by consent or otherwise. The London Tramways Company Limited did not cause an appearance to be entered, but took out a summons before the Master to rescind the order of December 15, and the Master on January 6, rescinded the order with costs. The defendant appealed from the Master’s order of January 6, to Field, J., who confirmed that order and dismissed the appeal with costs. The defendant appealed to the Exchequer Division, which rescinded the order refusing to make the London Tramways Company Limited a defendant, and ordered that the London Tramways Company Limited be made a party to the suit. The London Tramways Company Limited then appealed to the Court of Appeal. The Court of Appeal reversed the decision of the Exchequer Division, holding that the defendant was not entitled to have the London Tramways Company Limited added as a defendant to the action. The phrase in O. 16, r. 17 “a question in the action” was narrowly construed.

In *Har Narain Singh’s* case (5), the provisions of s. 32 of the Civil Procedure Code of 1882 (similar to O. 1, r. 10 of the Civil Procedure Code, 1908), were also construed narrowly. In that case a similar narrow construction was put upon the phrase

“effectually and completely to adjudicate upon and settle all questions involved in the suit.”

Amon v. Raphael Tuck and Sons Limited (6), [1956] 2 W.L.R. 372, and the other cases mentioned in my interlocutory judgment in *Winifred Roberts v. John Sinclair* (3), all relate to contract, and for want of any authority being cited to me dealing with a case of tort I had to derive what help I could mainly from the judgment of Devlin, J., in the *Amon* case (6). The *Horwell* case (4), is a case directly in point, being one of tort. It appears from the latter case that a plaintiff, being the dominus litis, cannot be compelled to sue a person, for damages in respect of a tort, whom he does not wish to sue. The instant case has

demonstrated only too clearly the impossible situations in which an unwilling plaintiff is likely to find himself at the trial where a defendant is forced upon him against his will. Moreover, the instant case has shown forcibly what little benefit such addition would be likely to afford the original defendant. The plaintiff was forced by reason of my order of August 17, 1961, to aver negligence against the third defendant. When evidence for the plaintiff was led not a title was extracted either in-chief or in cross-examination showing that the third defendant was even partially to blame for the accident. Difficulties arose over the verification of the amended plaint, and it transpired that the plaintiff verified the amended plaint because of this court's direction, apparently misunderstood, because it was never intended to order the plaintiff to verify averments which he did not believe to be true. Thus Mr. Murray was placed in a dilemma by my order of August 17, 1961, when it was made clear to him that I was not directing the plaintiff to verify averments which he did not believe to be true. The plaintiff was unwilling to verify the averments in the amended plaint, because he did not believe them to be true, when I held that the existing verification did not comply with O. 6, r. 15 (2) of the Civil Procedure Code, though it appears that there is authority that the verification "What is stated above is true to the best of my knowledge, information and belief" is sufficient compliance with O. 6, r. 15 (2) of the Civil Procedure Code, namely, *Rajit Ram v. Katesar Nath* (7) (1896), 18 All. 396. I ordered the pleadings to be verified in what I considered to be a proper manner by both first and second defendants and the plaintiff. The first and second defendants were willing and able so to verify, but the plaintiff was not. Being a non-material irregularity, I ordered the matter to be stood over until later in the trial when, if necessary, further consideration would be given to it. In the event, further consideration was not necessary, as the third defendant had no case to answer.

A further difficulty arose because at the end of the evidence for the first and second defendants it became apparent that a material witness had not given evidence, namely, Selemani Waziri, the driver of the lorry DSN 53 on which the plaintiff's son was a passenger. Mr. Murray was of the opinion that he could not call him as a witness for the plaintiff because he would obviously later be the principal witness for the third defendant. He was not called by third defendant in the event, of course, because the third defendant had no case to answer. In view of the existing evidence I did not consider it necessary for the court to exercise its powers and call this witness.

Mr. Murray acted with the utmost rectitude, and in observing the proprieties even argued on the preliminary points, contrary to the line he had taken on the application to join the third defendant, that Mr. Beynon should not be heard as there was an order of this court directing joinder of the third defendant and the third defendant had been joined and had been served with the amended plaint. Suffice it now to state that in my view, after consideration of the authorities cited by Mr. Beynon, a defendant cannot be added under O. 1, r. 10 (2) of the Civil Procedure Code, even if he be a willing party, in the face of opposition from the plaintiff in a suit in tort.

I do not feel it incumbent upon me in the circumstances to deal with the other matters raised by Mr. Beynon on preliminary points.

Submission of the third defendant upheld.

For the plaintiff:

WD Fraser Murray

For the first and second defendants:

HG Dodd

For the third defendant:

AC Beynon and DD Patel

For the plaintiff:

Advocates: *Fraser Murray, Thornton & Co*, Dar-es-Salaam

For the first and second defendants:

Dodd & Co, Dar-es-Salaam

For the third defendant:

AC Beynon, Dar-es-Salaam

CM Patel v The Commissioner of Income Tax
[1961] 1 EA 698 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	1 December 1961
Case Number:	42/1961
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Newbold JA
Appeal from:	H.M. High Court of Tanganyika–Sir Ralph Windham, CJ

[1] Income tax – Limitation – Inter-territorial body corporate with full legislative powers – Power to collect income tax in each territory – Whether High Commission is emanation of Crown – Whether High Commission is the Crown for collection of income tax – Status of High Commission in constituent territories – East African Income Tax (Management) Act, 1958, s. 124 (1) – East Africa (High Commission) Order in Council, 1947, s. 1, s. 4, s. 9, s. 10, s. 12, s. 28, s. 32, s. 33, s. 48 – Indian Limitation Act, 1877, Schedule, Art. 115, 120 and 149 – Government Suits Ordinance (Cap. 5), s. 2 (T.) – Indian Acts (Application) Ordinance (Cap. 2), s. 5 (T.) – Indian Code of Civil Procedure, 1908, s. 79.

Editor's Summary

The respondent having sued the appellant to recover income tax and penalties, the appellant raised certain preliminary issues all of which were determined against the appellant by the High Court. On a further appeal it was submitted for the appellant that the suit concerned assessments for the years of income 1951–1954 inclusive, that the assessments became payable on November 1, 1956, and that since the suit was not filed until August 27, 1960, the claim was barred under art. 115 of the Schedule to the Indian Limitation Act, 1877. It was also claimed that the High Commission as a body corporate with power to sue and be sued was not an emanation of the Crown and could not delegate its power to sue and, accordingly, s. 124 of the East African Income Tax (Management) Act, 1958, was ultra vires.

Held –

- (i) the provisions of the East Africa (High Commission) Order in Council, 1947, clearly show that the High Commission is an agent of and represents the Crown in carrying out specified functions of government in East Africa; it can properly be described as an emanation of the Crown and its incorporation does not necessarily prevent it being such an emanation, or at least a servant or agent of the Crown entitled to the privileges of the Crown.
- (ii) within its sphere the High Commission is vested with full powers of legislation and the collection of income tax is clearly within Item 5 of the Third Schedule to the Order in Council and, accordingly, s. 124 of the East African Income Tax (Management) Act, 1958, is not ultra vires.
- (iii) article 149 of the Schedule to the Indian Limitation Act, 1877, applies to all suits by or on behalf of the Crown in right of its government in Tanganyika and suits for tax are suits on behalf of the Crown in its government in the territory; if art. 149 was not applicable, art. 120 was the only other article which could apply and in either case the suit was not barred.

Appeal dismissed.

Cases referred to:

- (1) *MacKenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517.
- (2) *Tamlin v. Hannaford*, [1950] 1 K.B. 18; [1949] 2 All E.R. 327.
- (3) *Hubble v. Commissioner for Transport* (1952), 19 E.A.C.A. 97.
- (4) *Rajani v. Waring* (1936), 1 T.L.R. (R.) 574.

December 1. The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes V-P: This is an appeal from a decision of the High Court of Tanganyika on a preliminary issue raised by the defendant, the present appellant, in a suit by the respondent, the Commissioner of Income Tax, to recover tax and penalty alleged to be payable by the appellant.

Three preliminary issues were argued in the High Court before the learned Chief Justice, who decided all three in favour of the respondent. There has been no appeal against his decision on two of the preliminary issues. The third, which is the subject of this appeal, concerns the period of limitation applicable to suits for the recovery of income tax in Tanganyika. The suit relates to assessments to tax in respect of the years of income 1951 to 1954 inclusive. The suit was filed on August 27, 1960, and it is common ground that the assessments became payable on November 1, 1956. The appellant contends that the relevant period of limitation under the Indian Limitation Act, which applies in Tanganyika, is three years, and that therefore, the suit is statute barred. Limitation was duly pleaded in the written statement of defence.

The suit was brought by the respondent under sub-s. (1) of s. 124 of the East African Income Tax (Management) Act, 1958 (hereinafter referred to as “the Income Tax Act”), which reads as follows:

“124. (1) Where:

- (a) a demand note has been served on any person under s. 120 and payment of the tax set out therein has not been made within thirty days from the date of service of such demand note; or
- (b) a notice has been served on any person under s. 123 and such person has failed to comply with such notice,

then the tax due by such person may be sued for and recovered as a Crown debt in a court of competent jurisdiction by the Commissioner in his official name with full costs of suit from such person.”

The East African Income Tax (Management) Act, 1958, is an Act for, *inter alia*, “the charge, assessment and collection of income tax” enacted by the East Africa High Commission (hereinafter referred to as “the High Commission”), under the East Africa (High Commission) Order in Council, 1947 (hereinafter referred to as “the Order in Council”).

It is convenient to deal here with two points raised on the appeal in relation to the High Commission. These were that the High Commission is a body corporate with power to sue and be sued, and therefore (a) the High Commission is not an emanation of the Crown; and (b) the High Commission cannot delegate its power to sue and therefore s. 124 of the Income Tax Act is ultra vires.

As to the first point, the fact that a body is incorporated does not necessarily prevent it being an emanation of the Crown, or at least a servant or agent of the Crown entitled to the privileges of the Crown. In *MacKenzie-Kennedy v. Air Council* (1), [1927] 2 K.B. 517 at p. 532 Atkin, L.J., said:

“The Crown may and does employ as its servant or servants, an individual, a joint committee or board of individuals, or a corporation. None can be made liable in a representative capacity for tort”.

In *Tamlin v. Hannaford* (2), [1950] 1 K.B. 18 it was held that the British Transport Commission is not a

servant or agent of the Crown. At p. 24 of

the report, after concluding that the servants of the Commission are not civil servants, that the property of the Commission is not Crown property, and the rights and liabilities of the Commission in relation to the railways are

“quite inconsistent with the notion that the Commission is itself a government department or agent of the Crown”,

Denning, L.J. (as he then was) continues:

“We do not find it very useful to draw analogies from other bodies which are differently constituted and differently controlled and exist for different purposes. The Territorial Forces’ Associations, for instance, are not concerned with commercial matters, but with the defence of the realm, which is essentially the province of government and are therefore to be considered agents of the Crown: *Territorial Forces’ Association v. Philpot*, [1947] 2 All E.R. 376; *Territorial and Auxiliary Forces’ Association of the County of London v. Nichols*, [1949] 1 K.B. 35. The post office is the nearest analogy. It is, of course, concerned with commercial matters, but is nevertheless a government department and its servants are civil servants. That is, however, an anomaly due to its history. The carriage of mail was a Crown monopoly long before the Postmaster-General was incorporated.”

The reasons for holding that the British Transport Commission is not a servant or agent of the Crown do not apply in the case of the High Commission. The Order in Council recites, *inter alia*, that:

“it is desirable and expedient in the interests of good government to make provision for the control and administration of certain matters and services of common interest to the inhabitants of the Colony and Protectorate of Kenya, the Trust Territory of Tanganyika and the Protectorate of Uganda and for that purpose to establish an East Africa High Commission and an East Africa Central Legislative Assembly for those territories”.

Section 4, which is the section establishing the High Commission, reads:

- “4.(1) There shall be established an East Africa High Commission, the headquarters of which shall be situate at Nairobi in Kenya, and which shall consist of the Governors of Kenya, Tanganyika and Uganda.
- “(2) The High Commission shall be a body corporate with perpetual succession and an official seal and shall be capable of suing and being sued and of purchasing, or otherwise acquiring, holding and alienating property moveable and immoveable, and of doing all such acts as bodies corporate may lawfully do.”

Section 9 enables the High Commission, *inter alia*, to take over the administration of the services mentioned in the First and Second Schedules to the Order in Council. These include such matters as the East African Directorate of Civil Aviation; the East African Income Tax Department; the East African Posts and Telecommunications Department; and the East African Customs and Excise Department; which are matters essentially within the province of government. The High Commission is also responsible for the East African Railways and Harbours Administration, but this service, unlike the railways in England, has always been operated by or on behalf of government in East Africa, and so more nearly resembles the Post Office in England. Section 10 provides:

- “10. The High Commission is hereby empowered and commanded to exercise its powers and duties in accordance with this Order, such instructions as may be issued to it under His Majesty’s Sign Manual and Signet, or

through a Secretary of State, and such Orders in Council and other laws as may from time to time be in force in the Territories”.

Section 12 provides for the appointment of officers, servants and agents of the High Commission, and sub-s. (3) reads:

- “(3) For the purpose of giving effect to the provisions of this Order, the High Commission may by Order provide for the transfer to any such officer, servant or agent of any statutory or other powers, duties or functions theretofore exercised or performed by any officer, servant or agent of any of the Governments of the Territories or of the High Commissioner for Transport established under the Kenya and Uganda (Transport) Order in Council, 1925”.

These provisions and others which I have not set out in detail, e.g. sub-s. (4) of s. 1, in which it is implicit that an officer of the High Commission is the holder of an office of emolument under the Crown; s. 28, which confers power on the High Commission to legislate, in relation to the subjects specified, “for the peace, order and good government of” the East African Territories; s. 32, which requires the High Commission to conform to Royal Instructions; and s. 33, which relates to reserve powers, leave me in no doubt that the High Commission is an agent of the Crown and represents the Crown in the carrying out of specified functions of government in East Africa. It can, I think, properly be described as an emanation of the Crown. It may be noted that in the case of *Hubble v. Commissioner for Transport* (3) (1952), 19 E.A.C.A. 97; at p. 106, a case before this court, it was not contested that the High Commission was an emanation of the Crown.

As to the second point the appellant’s contention is presumably based on the maxim “delegatus non potest delegare”. But I do not see that that maxim has any application here. Within its sphere, the High Commission is vested with full powers of legislation. The fact that it is itself a corporation “capable of suing and being sued” does not limit these powers which extend, for instance, to the creation of other statutory corporations with power to sue and be sued—e.g. s. 4 of the East African Posts and Telecommunications Act (Cap. 4) which constitutes the Postmaster-General a corporation sole. Collection of income tax, including provision for recovery by way of suit, is clearly within item 5 of the Third Schedule to the Order in Council, which reads:

- “5. Income tax—administration and general provisions (but not including rates of tax and allowances)”.

In my opinion s. 124 of the Income Tax Act is not ultra vires.

I come now to the main question in issue, namely, which article of the Schedule to the Limitation Act applies to suits for recovery of income tax under s. 124 of the Income Tax Act. The articles which have to be considered are art. 115, art. 120 and art. 149. These, as applicable to Tanganyika, read as follows:

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|---|-------------|---|
| “115. For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for. | Three years | When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases”. |
| “120. Suit for which no Six period of limitation is provided elsewhere in this Schedule. | Six years | When the right to sue accrues”. |

“149. Any suit by or on behalf of the Secretary of State for India in Council.	Sixty years	When the period of limitation would begin to run under this Act against a like suit by a private person”.
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For the appellant it was contended that art. 115 was applicable. For the respondent it was contended that art. 149 was applicable, or, if that article was held not to be applicable, then art. 120.

Article 149 of the Limitation Act of course requires modification in its application to Tanganyika. Such modification is authorised by s. 5 of the Indian Acts (Application) Ordinance (Cap. 2 of the Laws of Tanganyika) the material part of which reads:

“For the purpose of facilitating the application of the said Acts [which include the Limitation Act] any court may construe any provision with such modification not affecting the substance as may be necessary or proper to adapt the same to the matter before it . . .”

The learned Chief Justice cited and relied on a passage in the judgment of Dalton, C.J., in *Rajani v. Waring* (4) (1936), 1 T.L.R. (R.) 574 which reads as follows:

“The Indian Limitation Act, 1908, by art. 149 of the First Schedule, provides that the period of prescription in any suit by or on behalf of the Secretary of State for India in Council is sixty years. The reason for the reference to the Secretary of State for India in Council is supplied by the provision of s. 79 of the Civil Procedure Code which enacts that suits by and against the Government shall be instituted by or against the Secretary of State for India in Council. I am unable to see, so far as this case is concerned, that a litigant in Tanganyika derives any more or any less benefit from the Indian Limitation Act than he would have done had he brought his action in India against the Government there. The period of limitation in respect of suits by or on behalf of the Government is therefore sixty years”.

I would respectfully agree with the reasoning in that passage. I think the purpose of the article was clearly to prescribe the period of limitation in respect of suits by or on behalf of the Government of India. Subsequent amendments to art. 149 in India, which do not apply in Tanganyika, tend to confirm this to specifying in terms suits by or on behalf of Government. It was therefore, in my opinion, a proper adaptation to read art. 149 as applying in Tanganyika to suits by or on behalf of the Government of Tanganyika: that is, to suits by or on behalf of the Crown in respect of its Government in Tanganyika.

It was argued that s. 2 of the Government Suits Ordinance (Cap. 5 of the Laws of Tanganyika) provides that suits by or against the Government of Tanganyika shall be instituted by or against the attorney-general; and that therefore the modification to be read into art. 149 was the substitution of the attorney-general for the Secretary of State in Council. This argument at first sight appears plausible, but I do not think it is sound. In art. 149 the phrase “Secretary of State in Council” appears to me to be used as synonymous with “Government of India”. Suits by or against that Government could only be instituted by or against the Secretary of State in Council (s. 79 of the Indian Civil Procedure Code); and a suit “on behalf” of the Secretary of State in Council could only be a suit on behalf of the Government. Under s. 2 of the Government Suits Ordinance, while suits are, no doubt, in general instituted by or against the attorney-general, sub-s. (2) provides:

“(2) But the Governor may, if he thinks fit, from time to time by order published in the *Gazette* direct or permit any particular suit or class of

suits by or against the Government to be instituted by or against any person or public officer named or designated in the Order instead of the attorney-general.”

I can see no reason why the limitation prescribed by s. 149 should not be held to apply in the case of a suit by an officer so designated. Indeed, that was the case in *Rajani v. Waring* (4). Furthermore, it is obvious that a suit on behalf of the Government of Tanganyika cannot be regarded as a suit on behalf of the attorney-general. “Attorney-general” is not synonymous with “Government of Tanganyika”. Accordingly, I do not think the adaptation to be made in art. 149 is the substitution of attorney-general for Secretary of State in Council. The object of art. 149 as I understand it was to prescribe a sixty-year limitation period in respect of suits by or on behalf of the Government in India, and I think it is to be read as having the corresponding effect in Tanganyika.

Does it, however, apply to suits by or on behalf of the High Commission? The learned Chief Justice relied on the words of s. 124 of the Income Tax Act which says that tax due “may be sued for and recovered as a Crown debt” by the respondent in his official name, and held that

“this makes it clear, as I see it, that in suing for arrears of income tax the Commissioner of Income Tax is suing on behalf of the Government of [in the present case] Tanganyika, and thus of the Crown.”

I would respectfully agree that the effect of the section is to make it clear that arrears of income tax are a debt due to the Crown, and that this must mean the Crown in right of the government of the particular territory where the tax arises. Apart from the words of that section I would take the view (a) that the High Commission, in so far as matters within its sphere relating to Tanganyika are concerned, is the Crown in Tanganyika; and (b) that therefore, even if income tax is held to be tax due to the High Commission and not to the Tanganyika Government, a suit for recovery of tax by the respondent on behalf of the High Commission is still a suit on behalf of the Crown in right of its government in Tanganyika, and so within art. 149 of the Limitation Act. I have already concluded that the High Commission is an emanation of the Crown and have indicated that it possesses full legislative powers within its own sphere throughout the East African Territories. Such legislation prevails over legislation enacted by a territorial legislature (s. 28 of the Order in Council). The High Commission is to “take over” the administration of services within its sphere (s. 9 of the Order in Council). Officers of, *inter alia*, the income tax department of each territory are transferred to the service of the High Commission (s. 46 of the Order in Council). It appears to me that the conclusion from these provisions is that within its own sphere in each territory the High Commission replaces the local government and, within that sphere, is the Crown in the territory. As I have said earlier, I think art. 149 applies to all suits by or on behalf of the Crown in right of its government in Tanganyika, and the fact that part of its government in Tanganyika is conducted by one body and part by another body does not in my view affect the application of the article to all such suits.

It can, perhaps, be argued that the High Commission in each territory is in income tax matters at least, the agent of the territorial government. The territorial government fixes the rates of tax and allowances, and the proceeds of the tax are divided between the governments. In one sense this may be so, though I prefer the view that the High Commission is the Crown in the territory as regards matters within its jurisdiction. But, whichever may be the true view, it does not affect the conclusion that suits for tax are suits on behalf of the Crown in its government in the territory.

It was argued by junior counsel who appeared for the appellant that by reason of the words in the third column of art. 149 that the period of limitation under the article begins to run when the period under the Act would begin to run “against a like suit by a private person”, the article is not applicable to a suit for recovery of income tax which is obviously not a suit which can be brought by a private person. This argument was disclaimed by leading counsel for the appellant, I think rightly. At p. 1555 of *The Law of Limitation by Rustomji* (5th Edn.) the learned author in discussing the scope of art. 149 says:

“The sixty years’ rule applies to *all* suits whatsoever when brought by the Government.”

There is no suggestion that I can find in the commentary that suits for the recovery of tax do not fall within the section. I think the answer to junior counsel is that arrears of tax are a debt—they are expressly stated to be such in s. 124 of the Income Tax Act—and a suit for a debt of course lies at the instance of a private person. The way in which the debt arises is immaterial for the purposes of the article. The period of limitation commences when the debt becomes due and payable.

For these reasons I would hold that art. 149 of the Limitation Act applies in Tanganyika to suits under s. 124 of the Income Tax Act for the recovery of income tax.

If I am wrong in holding that art. 149 applies, there can, I think, be no doubt that the only other article which can apply is art. 120. It was argued that a statutory debt is within the term “implied contract”, and that income tax is payable by virtue of the breach of an implied contract and so falls under art. 115; and reference was made in support to Halsbury’s *Laws of England* (3rd Edn.) Vol. 8, p. 257, where statutory debts are referred to under the heading “Constructive Contracts”. The cases cited in the relevant passage in Halsbury have no relevance to the recovery of tax by the Crown. I cannot see that the recovery of tax by or on behalf of the Crown can in any way be regarded as “compensation” for the breach of an implied contract, so as to bring a suit for recovery of tax within art. 115.

Whether art. 149 or art. 120 of the Limitation Act applies, the appeal must fail. I would accordingly dismiss the appeal with costs.

Sir Kenneth O’Connor P: I have had the advantage of reading the judgment of the learned Vice-President. I agree that the High Commission is an emanation of the Crown and represents the Crown in carrying out specified functions of the Crown in East Africa. I agree that s. 124 of the East African Income Tax (Management) Act, 1958, is not ultra vires. I have no doubt that art. 115 of the Schedule to the Indian Limitation Act does not apply to the claim in the present case. I incline to the view that art. 149 is the article which applies; but I find it unnecessary to decide this point as, if art. 149 does not apply, art. 120 does and, in either case, the claim is not barred by limitation.

Newbold JA: I agree with the learned Vice-President and have nothing to add.

Appeal dismissed.

For the appellant:

KA Master QC and MS Chaddah

For the respondent:

GC Thornton (Senior Legal Secretary, E.A. High Commission)

For the appellant:

Advocates: *MS Chaddah*, Dar-es-Salaam

For the respondent:

The Legal Secretary, E.A. High Commission

Henry Hidaya Ilanga v Manyema Manyoka
[1961] 1 EA 705 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	25 November 1961
Case Number:	64/1961
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes V-P and Newbold JA
Appeal from:	H.M. High Court of Tanganyika—Murphy, J

[1] Evidence – Standard of proof – Trespass – Allegation of wrongful entry and removal of large sum – Standard of proof applicable.

[2] Damages – Trespass – Appeal on quantum – When appellate court will interfere on a question of quantum of damages.

Editor's Summary

The respondent had sued the appellant for damages for trespass and for the wrongful removal of livestock, cotton and Shs. 12,000/- cash. The appellant admitted the trespass and the taking away of property, which he stated he had returned with the exception of three cattle and one sheep, but he denied taking Shs. 12,000/- as alleged. He further stated that the livestock and property were seized to recover the price of a tractor which the respondent had sold to the appellant whilst still subject to a hire-purchase agreement and which had been seized by the owner from the appellant and he accordingly counterclaimed Shs. 14,950/- which he alleged he had paid to the respondent towards the price of the tractor. In his judgment the trial judge stated that none of the witnesses who had given evidence was particularly impressive except a police officer and that it would be difficult to find any fact proved by oral evidence alone. However, relying on three points which he considered supported the respondent's case regarding the Shs. 12,000/- he gave judgment for the respondent for the whole amount claimed and awarded him a further Shs. 5,000/- as damages for trespass. In his judgment the judge referred to the standard of proof as being the preponderance of probability. On appeal it was contended for the appellant that the trial judge misdirected himself as to the standard of proof and submitted that it was not correct that the standard of proof was the same in all civil cases, and that as the mere allegation was of breaking and forcibly taking which might amount to theft, the standard of proof required was high and at least as high as in cases of civil fraud. The appellant also appealed against the award of Shs. 5,000/- as being excessive.

Held –

- (i) the onus of proving the taking was on the respondent and a high standard of proof—comparable to that required in a case of civil fraud—was required to substantiate an allegation of the removal, in circumstances which could amount to theft, of a large sum from a house within the respondent's close.
- (ii) the trial judge did not apparently appreciate that there were gradations of the standard of proof in civil cases and applied a standard which was inappropriate to the circumstances of this case.
- (iii) the trial judge, having rejected the oral evidence as insufficiently reliable by itself to prove any fact, relied on three considerations which when examined did not support, or scarcely supported, the respondent's case.
- (iv) as the trial judge had rejected the oral evidence as insufficient unless supported by other evidence, it was open to an appellate court to examine the evidence other than the oral evidence upon which the trial judge relied in coming to his conclusion. *Benmax v. Austin Motor Co. Ltd.*, [1955] 1 All E.R. 326, applied.

- (v) the trial judge did not apply any wrong principle of law in assessing the damages at Shs. 5,000/-; that amount was neither so inordinately low nor so inordinately high as to be a wholly erroneous estimate of the damages and the disallowance of the respondent's claim for Shs. 12,000/- did not sufficiently affect the gravity of the trespass to justify a reduction in the damages.

Appeal allowed in part. Order accordingly.

Cases referred to:

- (1) *Bater v. Bater*, [1950] 2 All E.R. 458.
- (2) *Hornal v. Neuberger Products Ltd.*, [1956] 3 All E.R. 970.
- (3) *Benmax v. Austin Motor Co. Ltd.*, [1955] 1 All E.R. 326.
- (4) *Nance v. British Columbia Electric Railway Co. Ltd.*, [1951] A.C. 601.
- (5) *Eshenchunder Singh v. Shamachurn Bhutto Ltd.* (1866), 11 Moo. Ind. App. 5.
- (6) *West Rand Central Mining Co. Ltd. v. R.*, [1905] 2 K.B. 391.
- (7) *Gautret v. Egerton* (1867), L.R. 2 C.P. 371.
- (8) *United Dominions Trust (Commercial) Ltd. v. Parkway Motors Ltd.*, [1955] 2 All E.R. 557.
- (9) *Rowland v. Divall*, [1923] 2 K.B. 500.

November 25. The following judgments were read:

Judgement

Sir Kenneth O'Connor P: This is an appeal from the High Court of Tanganyika. At the outset of the appeal Mr. Shah informed us that he held Mr. Mann's brief merely for the purpose of informing the court that Mr. Mann, who had appeared for the plaintiff in the High Court (the respondent in this court) had no further instructions. Accordingly, he asked, and was granted, leave to withdraw. This, unfortunately, left the respondent unrepresented; but, having ascertained that he had been served personally with notice of the hearing date and had been notified of the intention of Mr. Mann not to appear unless further instructed, we ordered that the appeal should proceed.

The respondent (plaintiff in the High Court) sued the appellant (defendant) for damages for trespass and wrongful removal of cattle, cotton and money. The appellant is a sub-chief of the area in which the respondent is a resident and cultivator.

In a plaint dated November 19, 1959, the respondent alleged that the appellant, on or about August 12, 1959, by himself and/or his servants or agents, broke and entered the respondent's land, cattle boma and house and seized and drove away seventeen head of cattle and some sheep and goats, the property of the respondent. The value of the livestock was assessed at Shs. 4,535/-. The respondent pleaded further that in the month of September the appellant returned the livestock, except three head of cattle and one sheep of a total value of Shs. 765/-.

The respondent further pleaded that on the day after the original trespass, i.e. August 13, 1959, the appellant again broke and entered the respondent's premises and seized and carried away Shs. 12,000/-

the property of the respondent and cotton to a value of Shs. 1,000/-. Accordingly, the respondent claimed Shs. 13,765/-. He also claimed Shs. 5,000/- general damages, a sum for interest, and costs.

By his defence, filed in February, 1960, the appellant admitted seizing fifteen head of cattle, fourteen goats and five sheep only, and said that he had returned them. He pleaded that they had been seized

“in order to recover the price of a tractor which the plaintiff while still being subject of Hire-Purchase Agreement, sold to the defendant and which in exercise of his right was seized by the owner [one Hassanali] from the defendant”.

The appellant said that he had returned all the livestock to the respondent. He admitted having taken cotton; but said that its value was Shs. 639/36 only. He denied that he had taken the Shs. 12,000/- or any sum, denied that he was liable to pay Shs. 5,000/- or any sum as general damages, and denied that he was liable for interest.

In a counterclaim the appellant alleged that, in October, 1958, he had purchased a tractor from the respondent for Shs. 19,890/-, that at the time of the purchase the respondent had represented that the tractor was his (the respondent's) property and/or that he had a right to sell it and the appellant pleaded that he, the appellant, acting in good faith and without notice of any right in any person to the tractor, had purchased it and paid to the respondent Shs. 14,950/- towards the purchase price. He further averred that the tractor had been seized from the appellant's possession by Hassanali in exercise of a right of seizure under a hire-purchase agreement and that at that time the appellant had discovered that the respondent was a hirer only and had no right to sell the tractor: in consequence of the seizure the appellant had lost the tractor and the said sum of Shs. 14,950/- paid by him towards its purchase price; and he counterclaimed that sum with interests and costs.

In his reply the respondent averred that the appellant had compelled him, the respondent, to part with the tractor upon terms that the appellant should have the use and enjoyment of the tractor on payment by the appellant of a deposit of Shs. 7,000/- and monthly instalments of Shs. 1,000/- until the sum of Shs. 19,890/- had been paid. The respondent averred that an instalment had been paid by the appellant in May, 1959, which had brought the total amount paid to Shs. 14,000/-. The respondent alleged that thereafter the appellant had defaulted, with the result that the respondent was unable to pay the instalments due from him (the respondent) and the tractor had been seized from the possession of the appellant. The respondent denied that at the time the tractor was delivered to the appellant he had represented that the tractor was his property or that he had a right to sell it. The respondent admitted that the tractor had been seized by Hassanali, but denied that Hassanali had seized it in the exercise of a right under a Hire-Purchase Agreement or any other right, and he reiterated that the tractor would not have been seized had the appellant fulfilled his obligations of payment to the respondent. On May 30, 1960, the respondent gave further and better particulars of para. 2 of the reply. In these particulars he said, *inter alia*:

“2. The defendant asked the plaintiff if he could purchase the said tractor from him and the plaintiff replied that he could not sell it as he held it under hire-purchase terms.”

It will be observed that the respondent, having denied that he had represented to the appellant when handing over the tractor to him, that the tractor was his property or that he had a right to sell it, pleaded in unequivocal terms that when the appellant asked if he could purchase the tractor he, the respondent, replied that he could not sell it as he held it under hire-purchase terms. This will be referred to again hereafter a propos of the learned judge's finding (in favour of the respondent) that the transaction with Hassanali was not a hire-purchase arrangement and that the respondent had a right to sell the tractor—a case which was not made by the respondent and which was inconsistent with his pleadings.

On the issue whether or not cash had been taken by the appellant, the learned judge found in favour of the respondent. He found that the appellant had seized Shs. 12,000/- in cash, the property of the respondent: he awarded this amount to the respondent together with Shs. 5,000/- as general damages for the trespass and interest on both sums. The learned judge also awarded to the appellant Shs. 700/-, which he assessed as the value of the cotton taken, together with interest. He dismissed the appellant's counterclaim and gave the respondent the costs of the action and of the counterclaim. On appeal all these decisions were challenged. The respondent filed a cross-appeal claiming that a sum greater than Shs. 5,000/- should have been awarded as general damages.

It will be convenient first to deal with the finding that the appellant seized Shs. 12,000/- cash, the property of the respondent. The learned judge approached this issue after setting out certain undisputed facts. He said:

"There is a considerable conflict of evidence in this case and it will be convenient in the first place to set out certain facts which are not in dispute. The plaintiff is an African farmer and the defendant is a sub-chief. At the material time the plaintiff lived in a homestead at Dudomo village consisting of two houses, one of which was occupied by himself and his wife and the other by his son. In 1958 the defendant bought a tractor from the plaintiff. The plaintiff had previously bought the tractor from Hassanali and was still paying instalments on it at the time of the sale to the defendant. The defendant agreed to buy the tractor from the plaintiff for Shs. 19,890/-. He paid a first instalment of Shs. 7,000/- and agreed to pay the balance by monthly instalments of Shs. 1,000/-. Early in August, 1959, the tractor was seized from the defendant by Hassanali. At that time instalments were still owed by the plaintiff to Hassanali and by the defendant to the plaintiff. On August 12, 1959, the defendant sent some messengers to seize the plaintiff's cattle. He says that he did this because he 'lost control of his mind' and wanted to recover some of the money he had spent on the tractor. The messengers seized the cattle from the plaintiff's homestead in the presence of the plaintiff's wife but in the absence of the plaintiff and his son who were away. The following day the defendant himself went to the homestead with a lorry, a driver and two turnboys. Again the plaintiff's wife was present but not the plaintiff or his son. On this occasion the defendant seized the plaintiff's cotton, which was stored in the son's house, and took it away in the lorry. On August 19, the plaintiff, having in the meantime returned home and having discovered what had happened, made a statement to the police (exhibit E). In this statement he not only complained of the seizure of the livestock and the cotton, but alleged also that the sum of Shs. 12,000/- had at the same time been removed from a box in his son's room.

"The defendant, while admitting the seizure of the livestock (which was later returned) and of the cotton, denies having taken the Shs. 12,000/- and I will deal with this issue first."

The learned judge correctly said that the onus of proving that the defendant took the money was on the plaintiff. He then rightly rejected an argument of counsel for the defendant that, as the plaintiff's case amounted to an allegation that the defendant stole the money, the onus resting upon him was the same as upon the prosecution in a criminal trial. The learned judge said that if the defendant had been charged with stealing, the question of a claim of right would have had to be considered and continued:

"I must therefore hold that the degree of proof required is the same as in any civil proceedings, namely that there should be a preponderance of probability in favour of the plaintiff's assertion."

Mr. Thornton, for the appellant, contended that this was a misdirection. He submitted that while the standard of proof required in a civil case is not so high as that required in a criminal case, it is not correct to say or imply that the standard of proof is the same in all civil cases—namely a mere balance of probabilities: the standard varies according to the gravity of the matter to be proved and, as the allegation on the present issue was an allegation of breaking and forcibly taking possibly amounting to theft, the standard of proof required was very high—at least as high as is required in cases of civil fraud. I think that Mr. Thornton is right. The question was discussed by Denning, L.J. (as he then was) in *Bater v. Bater* (1), [1950] 2 All E.R. 458, at p. 459:

“It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.”

This passage was approved in *Hornal v. Neuberger Products Ltd.* (2), [1956] 3 All E.R. 970. In that case Denning, L.J., said at p. 973:

“The more serious the allegation the higher the degree of probability that is required; but it need not, in a civil case, reach the very high standard required by the criminal law.”

Hodson, L.J., in his judgment in that case also cited, as illustrative of progressive gradations in the standard of proof both in civil and criminal cases according to the gravity of the matter to be proved, a passage (quoted by Professor Kenny) from Lord Brougham’s eloquent speech in defence of Queen Caroline:

“The evidence before us is inadequate even to prove a debt—impotent to deprive of a civil right—ridiculous for convicting of the pettiest offence—scandalous if brought forward to support a charge of any grave character—monstrous if to ruin the honour of an English Queen.”

In the present case the learned judge went on to say that none of the witnesses who had given evidence as to matters in dispute (excluding one police officer) was particularly impressive and it would be difficult to find any fact proved upon oral evidence alone. In effect, the learned judge rejected the oral evidence as being insufficient to establish any fact unless supported by other evidence. An appellate court is in as good a position as a court of first instance to evaluate evidence other than oral evidence or evidence which does not depend on the credibility or reliability of any witness, and should not shrink from doing so: *Benmax v. Austin Motor Co. Ltd.* (3), [1955] 1 All E.R. 326, 329. It becomes important, accordingly, to examine the evidence other than the oral evidence upon which the learned judge relied in coming to his conclusion on the first issue.

Apart from oral evidence, the learned judge relied upon three matters which he said supported the plaintiff’s case rather than the defendant’s on this issue. The first of these was that the defendant was angry at the seizure of his tractor after he had paid Shs. 14,950/- towards the price of it and that the livestock and the cotton which he seized would only have given him a small proportion of the amount he had lost: it was, therefore, likely that the box would not have escaped his notice and that he would have taken the money. There might be force in that argument if it had been proved that the money (Shs. 12,000/-) was, in fact, in the box when the appellant visited the respondent’s premises. Mr. Thornton pointed out that there was only the word of the plaintiff and of his son, Nghomere, that any money was in the box or, if some money was, in fact, there, that

it amounted to Shs. 12,000/- and that the learned judge had said that it would be difficult to find any fact proved on oral evidence alone. As to the amount, the learned judge said:

“In the course of his closing address Mr. Gossain pointed out that there is only their evidence as to what amount was in the box. I agree, but the defendant has denied taking any money and if this is shown to be untrue, I can only accept the plaintiff’s evidence as to what the amount was.”

With the greatest respect, this seems to me to be a non sequitur.

The second matter, other than oral evidence, on which the learned judge relied (and this he described as perhaps the point which weighed heaviest against the defendant) was a letter which the defendant wrote to the police on August 27, 1959. A translation of that letter was put in the lower court. It read:

“Ref. No. Z/IT/21/18.

ZAGAYU ITILIMA.

The Officer i/c

27.8.59.

Station Police,

Maswa.

Sir,

Manyama s/o Manyoka

This is in connection with a case between myself and Manyama. I wish we could agree between ourselves though I admit his claims from me and I will pay him. Because I entered his premises and took away cotton which was stored there, I find that I went beyond boundaries even though I shall continue to refuse it so happened because I was annoyed.

If shall agree that I should pay back his property, how much shall I pay every month? In case of cattle, goats, sheep and money I got for cotton, are ready at hand.

Secondly on top of these I deserve punishment or warning for my being wrong towards Manyama.

Salaams,

Sd. H. Hidayu.

Sub-chief.

One copy to Manyama.”

Of this letter the learned judge said:

“It must be said in his favour that at that time he had already made a statement to the police (exhibit 4) in which he denied having taken the money. But the terms of the letter show that when he wrote it he was anxious to reach a settlement with the plaintiff and in its second paragraph he speaks of agreeing on how much he is to pay each month ‘except that the cattle, goats, sheep and cotton money are ready’. This clearly indicates that the defendant appreciated that there was something more due by him to the plaintiff in addition to the livestock and the money which he had obtained by selling the cotton. In the witness box the defendant had great difficulty in explaining what he meant by the reference to paying so much each month. He said that the question of general damages for trespass came into his mind. But at that time there was no claim against him for general damages and it does not appear to be the kind of matter which would occur to him readily. Further, if his explanation is true, one might expect that the question which would have exercised his mind was how much he was to pay in all and not merely how much he was to pay each month.”

I should have thought, with respect, that a sub-chief who was presumably well acquainted with African court procedure might well have had the matter of damages or compensation for a wrong in mind and that the words of the letter “I deserve punishment” were a strong indication that in fact he did realize that he had made himself liable to some penalty, which would probably be a pecuniary penalty. What the learned judge, however, treated as most important was the second paragraph. On appeal, Mr. Thornton challenged the correctness of the translation of this paragraph. He said that the Swahili was in a reciprocal form involving mutuality and that the meaning was not that the writer alone should pay something each month, but that the writer and the recipient should each pay something. Mr. Thornton tendered a translation of the letter which he had himself made. This we felt unable to accept. In view, however, of the importance which the learned judge had attached to this letter and to the fact that the translation in the lower court did not seem to have been certified by a court interpreter, we felt that it was essential to have a certified translation. We accordingly instructed the court interpreter to prepare and certify a translation, which he did, and we called him as a witness to authenticate his translation by sworn evidence. His translation reads:

“Translation–Literal.

Ref. No. Z/IT/21/18

Mr. Officer i/c

S. Police

Maswa.

Zagayu Itilima

27.8.59.

Manyama s/o Mayoka

Sir, regarding the matter between me and this man Manyama, I have discussed and arrived at the conclusion that I agreed all the debts which I have to settle with him, that I shall pay. That I entered his town and took cotton, I realized that I went beyond the boundary of peace although I shall still deny, but it is the result of my touch.

But we shall only come to terms in paying one another, how much it will come to every month, but cows, goats and sheep and money for cotton are ready.

Secondly with regard to this offence I have agreed to have punishment decided on me or certain reprimands in offending Manyama.

With compliments

(sgd.) H. Hidaya

Mwambilija

One copy to Manyama.”

.....

The court interpreter explained that “I shall still deny” referred to some detriment other than the taking of cotton. On examining his translation it seems that there is an element of mutuality expressed in the second paragraph and that the appellant was seeking something in the nature of a mutual undertaking to settle cross-claims by payment of monthly instalments. It does nevertheless appear that the appellant felt himself liable for something beyond the return of the livestock and delivery of the proceeds of the cotton; but whether this referred to a refund of Shs. 12,000/- (as the plaintiff alleged) or a pecuniary “punishment” for his trespass does not emerge. With the greatest respect to the learned judge, I should have thought that the second alternative was at least as likely as the first and that the letter (when correctly translated) so far from weighing heavily against the appellant, hardly helped the respondent’s

case at

all. As Mr. Thornton pointed out, this letter which was addressed to the police officer in charge of Maswa was dated August 27, 1959. In a statement, however, made to the police on August 19, the appellant had expressly and specifically denied seeing the Shs. 12,000/- or taking anything but livestock and cotton, which cotton, he said, he had sold for Shs. 639/36.

The third matter on which the learned judge relied was that the appellant had not refuted, in replying to the second letter (exhibit A. 5) sent by the respondent's advocates, a claim for the Shs. 12,000/- alleged to have been taken by him. The appellant in replying (exhibit A. 6) did not discuss any of the respondent's claims but merely acknowledged the letters, said that he was unable to go to Mwanza to call at the advocate's office as they had requested, and suggested that he and the respondent should both go and lay their case before the police at Maswa. I am unable to find anything in that letter which could properly be construed as an admission, tacit or otherwise, of having taken Shs. 12,000/-. The fact that the appellant did not expressly mention the Shs. 12,000/- is certainly no more remarkable than the fact that the respondent's advocates had not mentioned it in their first letter in which they had claimed only the livestock and the cotton. Both the respondent and the appellant had already mentioned the Shs. 12,000/- to the police, one by way of claim and the other by way of denial.

Mr. Thornton pointed out that the respondent might well have expected the appellant to claim back from him the Shs. 14,950/- paid by the appellant towards the purchase of the tractor and that a counterclaim for the value of the livestock and cotton taken by the appellant would only offset about Shs. 3,000/- of any such claim. A fictitious counterclaim, however, for Shs. 12,000/- for cash alleged to have been taken would offset the whole of the appellant's expected claim. I do not find it necessary to pronounce any opinion on that thesis. I do, however, consider it somewhat remarkable that the respondent should keep as large a sum as Shs. 9,000/- or Shs. 12,000/- under his son's bed when he owed instalments on two tractors, both of which were seized by Hassanali.

My opinion on the issue relating to the alleged taking by the appellant of the Shs. 12,000/- is as follows:

The onus of proving the taking was on the plaintiff/respondent. A high standard of proof—comparable to that required in a case of civil fraud—was required to substantiate an allegation of the removal, in circumstances which could amount to theft, of a large sum of money—Shs. 12,000/-—from a house within the respondent's close. The learned judge did not, apparently, appreciate that there were gradations of the standard of proof in civil cases and applied a standard which was inappropriate to the circumstances of this case. The learned judge rejected the oral evidence as insufficiently reliable by itself to prove any fact and based himself on three considerations which, when examined, do not support, or scarcely support, the plaintiff's case. I feel confident that if the learned judge had had the advantages, which we have enjoyed, of having his attention drawn to *Bater v. Bater* (1), and *Hornal v. Neuberger Products Ltd.* (2), and of having before him a correct translation of the letter exhibit A. 2, he would have applied to this issue a higher standard of proof than he did apply and would have held that the plaintiff had not discharged the onus that lay upon him of proving that the defendant had made away with the plaintiff's Shs. 12,000/-. That is the conclusion at which, applying the appropriate standard of proof and after considering all the evidence in the High Court and this court, I have unhesitatingly arrived.

I pass on to consider the second item of the plaintiff's claim—the value of the cotton. The plaintiff claimed Shs. 1,000/-. The defendant produced evidence that he had sold the cotton for Shs. 639/36 and said that he had later paid Shs. 600/- to the plaintiff which had been received by the plaintiff (together with the

livestock) in settlement of the plaintiff's claim. The plaintiff denied having received this money. The learned judge held that the plaintiff had failed to establish that the Shs. 600/- had been paid. This is a finding of fact which there is no reason to disturb. The learned judge went on to award Shs. 700/- to the plaintiff as the value of the cotton, which he described as a "somewhat arbitrary figure". With respect, I cannot find any evidence to support the figure of Shs. 700/- and would substitute for it Shs. 639/36 which, apparently, the cotton fetched at a genuine sale at or about the material date.

The appellant alleges that the sum of Shs. 5,000/- awarded as general damages by the learned judge was excessive; and the respondent alleges that it was inadequate. In considering this question I apply the rule laid down by the Privy Council in *Nance v. British Columbia Electric Railway Co. Ltd.* (4), [1951] A.C. 601 at p. 613, when discussing the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a judge:

"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v. Lovell*, [1935] 1 K.B. 354), approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601."

In my view, the learned judge did not apply any wrong principle of law in assessing the damages at Shs. 5,000/- and that amount is not either so inordinately low or so inordinately high as to be a wholly erroneous estimate of the damages. Accordingly, this court would not be justified in interfering with it. The fact that the respondent's claim for Shs. 12,000/- has been disallowed does not, in my opinion, sufficiently affect the seriousness of the trespass committed to justify a reduction in the damages awarded.

I come now to the question of the counterclaim. On this part of the case the learned judge found that the respondent sold the tractor willingly to the appellant and that the appellant had notice that there were instalments owed by the respondent to Hassanali. The learned judge continued:

"But in my view the counterclaim must fail for another reason, namely that there is nothing to show that the seizure of the tractor by Hassanali was lawful. Whatever opinion the plaintiff may have had as to the nature of the transaction between himself and Hassanali, his evidence is that it was not a Hire-Purchase Agreement but an outright sale with payment by instalments. The only person who would be in a position to confirm or contradict this is Hassanali himself and, through no fault of either party, he has not given evidence in this case. He was summoned on behalf of the defendant to appear on August 16, 1960, which was the date originally fixed for trial. On that date the court received a telegram from Hassanali saying that he was ill and that a doctor's certificate had been posted. It does not appear that this certificate was ever received. The case was adjourned at the request of the defendant's advocate, and it is not disputed (it is indeed common knowledge at Musoma) that Hassanali subsequently left the country. There is thus only the plaintiff's evidence as to his purchase

from Hassanali and I must accept this evidence which shows that he became the owner of the tractor. This ownership subsequently passed to the defendant and I cannot find that Hassanali had any legal right to seize the tractor from him.”

As already stated, the plaintiff had pleaded in unequivocal terms in his particulars of para. 2 of the reply that when the defendant asked the plaintiff if he could purchase the tractor from him, the plaintiff replied that he could not sell it as he held in under hire-purchase terms. He repeated this in evidence. At p. 24 of the record he said:

“I knew I had no right to sell the tractor before I had finished paying for it . . . I told them [his advocates] that I said to the plaintiff that I could not sell the tractor because it was on hire-purchase terms”.

It was never the plaintiff’s case as pleaded or put forward by him that he had a title to sell the tractor because the transaction with Hassanali was a sale by instalments and not a hire-purchase arrangement. That argument was accepted by the learned judge because the plaintiff said in evidence that there was no written Hire-Purchase Agreement. The learned judge does not seem to have considered whether there could or could not be, in Tanganyika at the relevant time, a valid oral Hire-Purchase Agreement, or to have considered whether a sale of a tractor otherwise than in writing would be a valid transaction having regard to s. 3 of the Credit to Natives (Restriction) Ordinance, or whether, if so, a credit sale was likely to have been entered into by Hassanali when he would have been prevented by that Ordinance from recovering the purchase price. However that may be, it was not, with respect, correct to decide in favour of the plaintiff on a case not made on his pleadings and inconsistent therewith. As Lord Westbury said in delivering the judgment of the Judicial Committee of the Privy Council in *Eshenchunder Singh v. Shamachurn Bhutto* (5) (1866), 11 Moo. Ind. App. 5; 20 E.R. 3 at p. 8:

“This case is one of considerable importance, and their lordships desire to take advantage of it, for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.”

and again at p. 10:

“Their lordships are obliged to disapprove of the decision that has been come to by the High Court, they desire to have the rule observed, that the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from.”

Lord Alverstone in *West Rand Central Mining Co. Ltd. v. R.* (6), [1905]2 K.B. 391, at p. 400, stated the same principle. Approving a passage in the judgment of Willes, J., in *Gautret v. Egerton* (7) (1867), L.R. 2 C.P. 371, he said:

“The plaintiff must, in his declaration, give the defendant notice of what his complaint is. He must recover *secundum allegata et probata*”.

Ignoring then, the finding (which was not open) that the plaintiff could have passed a good title to the tractor because there was no Hire-Purchase Agreement but a sale by instalments, what is the position on the counterclaim? The learned judge found as a fact that the appellant had had notice that there were instalments owed by the respondent to Hassanali. If there was a Hire-Purchase Agreement with (as would be common form) a clause forbidding the respondent to assign or part with possession of the vehicle until the instalments had been

paid, and the appellant knew this, then Hassanali would be entitled to seize the tractor from him on breach of that covenant and the appellant, having taken it in breach of that covenant, would have no legal interest in the tractor: *United Dominions Trust (Commercial) Ltd. v. Parkway Motors Ltd.* (8), [1955] 2 All E.R. 557. If the appellant knew that the respondent had no title to sell the vehicle, then he was not relying on any implied warranty under the Sale of Goods Ordinance that the respondent had a right to sell, and cases such as *Rowland v. Divall* (9), [1923] 2 K.B. 500, are distinguishable. The learned judge by his finding that the appellant had notice that there were instalments due by the respondent to Hassanali found against the appellant's allegation that he purchased without notice of any right in favour of any person other than the respondent. Accordingly, I do not think that the appellant can be said to have established the case which he put forward on his counterclaim. Moreover, by failing to carry out his part of the contract to continue to pay instalments to the respondent until all were paid, the appellant, in my opinion, disabled himself from recovering the sums which he had paid under that contract when the tractor was seized. He himself was in breach of the contract under which he sought to recover. The question whether in fact the failure by the appellant to keep up his instalments to the respondent was the cause of the failure of the respondent to keep up his payments to Hassanali was not sufficiently investigated. The position is not satisfactory; but, on the facts so far as they were established, I would not be prepared to say that the appellant had established his counterclaim and to upset the learned judge's order dismissing it with costs.

In the result, I would set aside the decree dated June 26, 1961, and substitute a decree:

- (1) dismissing the plaintiff's claim for Shs. 12,000/-;
- (2) giving judgment for the plaintiff for Shs. 639/36 the value of the cotton taken with interest at court rates;
- (3) awarding the plaintiff Shs. 5,000/- as general damages with interest; and
- (4) awarding the plaintiff half the costs of the claim; and
- (5) dismissing the counterclaim with costs.

Thus I would allow the appeal only on the questions of the alleged taking of the Shs. 12,000/- and the reduction of the value of the cotton from Shs. 700/- to Shs. 639/36, and dismiss it on the questions of the quantum of general damages and the counterclaim. The appellant should have half the costs of the appeal. The cross-appeal should be dismissed with costs.

Sir Alastair Forbes V-P: I agree and have nothing to add.

Newbold JA: I also agree.

Appeal allowed in part. Order accordingly.

For the appellant:

RS Thornton

The respondent did not appear and was not represented.

For the appellant:

Advocates: *BK Gossain*, Mwanza

For the respondent:

Reuben Musanje v Tomasi Yamulemye
[1961] 1 EA 716 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 13 October 1961
Case Number: 15/1961
Before: Sir Alastair Forbes V-P, Sir Trevor Gould and Crawshaw JJA
Appeal from: H.M. High Court of Uganda–Lyon, J

[1] *Jurisdiction – Buganda courts – Suit for damages – Car collision – Both parties Africans – Suit filed in the High Court – Submission on appeal that case should have been transferred to Buganda court – Jurisdiction of High Court – When High Court must transfer case to Buganda court – Civil Procedure Rules, O. 9, r. 24 and O. 42(U.) – Civil Procedure Ordinance, s. 11 (7) and s. 69 (1).(U.) – Buganda Courts Ordinance, s. 2, s. 3 (1), s. 4, s. 6 (1), s. 7, s. 8, s. 9, s. 10, s. 11 and s. 12 (U.) – Native Courts Ordinance (Cap. 77), (U.) – Sale of Goods Ordinance (Cap. 214), (U.) – Interpretation and General Clauses Ordinance, s. 36 (U.) – Buganda Native Laws (Declaratory) Ordinance, (U.) – Law Reform (Miscellaneous Provisions) Ordinance, 1953, (U.) – Indian Contract Act, 1872 – African Order in Council, 1892, (U.) – Uganda Agreement, 1900, (U.) – Uganda (Judicial) Agreement, 1905, (U.) – Uganda Order in Council, 1902, s. 15, s. 18 and s. 20 (U.).*

Editor’s Summary

The respondent obtained an *ex parte* judgment of the High Court of Uganda, for Shs. 6,065/- in respect of damage suffered in a traffic accident between the appellant’s and the respondent’s cars. The appellant subsequently applied to the High Court under O. 9, r. 24 of the Civil Procedure Rules to set aside the *ex parte* judgment and decree on the ground that both parties to the suit were Africans and that accordingly under s. 7 of the Buganda Courts Ordinance the suit should have been transferred to the principal court of Buganda. The court held it had no jurisdiction under O. 9, r. 24, to set aside the judgment and decree on that ground and adjourned the application to enable the appellant to apply to the original judge for review under O. 42, but this application was dismissed as the judge held that he was *functus officio* and that the only remedy was by way of appeal to this court. On appeal the appellant contended that as both the parties were Africans, by virtue of s. 7 of the Buganda Courts Ordinance, the High Court should not have heard the case but should have sent it to the principal court of Buganda for determination. Section 7 *ibid.* provides that

“where any proceedings of a civil or criminal nature which a court has jurisdiction to try are commenced in a subordinate court or the High Court, they shall be transferred for hearing to a court having jurisdiction”,

and s. 9 (c) provides, *inter alia*, that

“subject to any express provision to the contrary, no court shall have jurisdiction in any proceedings . . . taken under any Ordinance or any English or Indian law in force in the Protectorate unless such court has been authorised to administer or enforce such Ordinance or law by the terms of an Ordinance or under s. 12 of this

Ordinance”.

At the appeal no order made under s. 12 *ibid.* relevant to this case was brought to the notice of the court. The appellant also submitted that as compensation for damage caused by negligence could be awarded under native customary law, the High Court had no jurisdiction except to transfer the case to the principal court under s. 7 *ibid.* The respondent’s case was that in view of sub-s. (1) of s. 15

of the Uganda Order in Council, 1902, s. 7 of the Buganda Courts Ordinance was ultra vires in so far as it purported to deprive the High Court of jurisdiction; that consequently concurrent jurisdiction was vested in the High Court and the Buganda courts, and that a plaintiff may elect in which court he will proceed, that in any case this was an action “taken under” English law, since not only English common law but also statutory law, e.g. Part V of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, would be applicable, and that since the Buganda courts are precluded from administering the provisions of that Ordinance by virtue of s. 10 (d) of the Buganda courts Ordinance, the case was excluded from the jurisdiction of the Buganda courts. By s. 10 (d) *ibid.* a Buganda court

“shall administer and enforce only the provisions of any Ordinance or other law which the court is authorised to administer or enforce by the terms of any Ordinance”.

Held –

- (i) every court in Uganda including native and Buganda courts, regardless of the parties, must apply the provisions of an Ordinance in lieu of the provisions of native law where there is any inconsistency between the two.
- (ii) it was implicit in the provisions of s. 18 of the Uganda Order in Council, 1902, that a “court of special jurisdiction” created by or under an Ordinance under that section may be vested with exclusive jurisdiction in relation to the cases with which it is to deal notwithstanding s. 15 (1) of the Order in Council.
- (iii) the Buganda courts were designed to apply a particular type of law as between members of a particular class of people and were clearly within the term “courts of special jurisdiction”, and it followed, therefore, that s. 7 of the Buganda Courts Ordinance was *intra vires*.
- (iv) the point at which it becomes mandatory on the High Court to transfer a case to a Buganda court is when the High Court is satisfied that both parties are Africans (as defined) and that the action is within the jurisdiction of a Buganda court; that might require evidence or it might be ascertainable from the pleadings, but until the High Court is so satisfied it is justified in proceeding with the case.
- (v) before it can be satisfied that a Buganda court has jurisdiction, the High Court must be satisfied that the court trying the case will not be required to administer and enforce, on behalf of either party, the provisions of any Ordinance, and where it is possible that the provisions of an Ordinance may be invoked it is the duty of the defendant, if he desires the transfer of the case, to satisfy the High Court that such provisions will not be invoked on the facts of the case.
- (vi) in the instant case the appellant had not shown that if the case went to trial the provisions of Part V of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, would not be invoked as a matter of defence; since he had not done so, it was impossible to say that the principal court of Buganda had jurisdiction in the case.

Appeal dismissed.

Cases referred to:

- (1) *Perkowski v. City of Wellington Corporation*, [1958] 3 All E.R. 368.
- (2) *W. W. K. Nadiope v. D. M. Mwebe* (1939), 6 E.A.C.A. 44.

- (3) *Yolamu Kaluba v. Kerementi Kajaya*, [1957] E.A. 312 (U.).
- (4) *Thomas Musoke v. Haji Asumani Seninde*, Uganda High Court Civil Case No. 261 of 1957(unreported).
- (5) *R. v. Ochola s/o Katholi*, [1959] E.A. 72. (U.).
- (6) *R. v. Yoanna Muigira* (1942), 6 U.L.R. 118.
- (7) *Fabiano Bukenya v. David Mutebi and Another*, [1959] E.A. 366 (U.).
- (8) *B. K. M. Kiwanuka v. Yosefu Wasswa and Others*, [1959] E.A. 533 (U.).
- (9) *Haji Ibrahim Mutyaba v. Arthur Asaph Kalanzi*, [1960] E.A. 367 (U.).

October 13. The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes V-P: This is an appeal from an *ex parte* judgment and decree of the High Court of Uganda dated October 7, 1959, whereby the respondent was awarded a total of Shs. 6,065/- together with interest and costs, in respect of damage suffered as the result of a traffic accident between the appellant's car and the respondent's car.

Subsequently an application was made by the appellant to the High Court under O. 9, r. 24, of the Civil Procedure Rules of Uganda to set aside the *ex parte* judgment and decree on the ground that both parties to the suit were Africans and that accordingly, under s. 7 of the Buganda Courts Ordinance (Cap. 77 of the 1951 edition of the Laws of Uganda) the suit should have been transferred to the principal court of Buganda. The learned judge who heard the application agreed with this contention but held that he had no jurisdiction under O. 9, r. 24, to set aside the judgment and decree on that ground. He adjourned the application to enable the appellant to apply to the original judge for review under O. 42 of the Civil Procedure Rules. This application was made, but was dismissed with costs, the learned judge holding that he was *functus officio* and that the only remedy was by way of appeal to this court. By this time—September 20, 1960—the time for appealing against the original judgment and decree had, of course, long expired. What happened then is not entirely clear, but it would seem that an application for leave to appeal was made and was granted, but that it was an application for leave to appeal against the order of refusal to exercise the powers of review; and that therefore this appeal against the original judgment and decree was filed without any order extending time for the filing of the appeal. However, Mr. Lubowa, for the respondent, did not take any point in relation to the late filing of the appeal and, in view of the circumstances of the case, we granted such extension of time as might be necessary to enable the appeal to proceed.

Although Mr. Lubowa did not take objection to the late filing of the appeal, he did take a preliminary objection that, since the appellant had not appeared and taken the point as to jurisdiction in the High Court, it was not open to him to do so at this stage. The question raised, however, is purely a question of law, going to the jurisdiction of the court and no issues of fact are involved. Sub-Section (1) of s. 69 of the Civil Procedure Code (Cap. 6) provides that an appeal may lie from an original decree passed *ex parte*. In my opinion the appellant should not be precluded from raising the matter on the appeal (*Perkowski v. City of Wellington Corporation* (1), [1958] 3 All E.R. 368); though, if he is successful, the fact that he did not raise it in the court below may affect the question of costs.

The grounds of appeal are as follows:

- “1. That judgment of Her Majesty's High Court was wrong in law in that both the plaintiff and the defendant being Africans, the case should not have been heard before Her Majesty's High Court.
- “2. The principal court at Mengo is competent to determine the dispute between the parties.”

The appeal is based on the provisions of s. 7 of the Buganda Courts Ordinance. That Ordinance provides for the constitution of native courts in Buganda. Section 3 relates to the principal court of Buganda, and sub-s. (1) of that section provides:

- “3 (1) It is hereby confirmed that the court of the Lukiko (hereinafter

referred to as the principal court) recognised by art. 11 of the Uganda Agreement, 1900, is the principal court of Buganda and has, subject to the provisions of this Ordinance, full jurisdiction, civil and criminal, throughout Buganda over all Africans.”

Under s. 4, courts subordinate to the principal court may be established by the Kabaka with the consent of the Governor. The word “court” is defined in s. 2 to mean a court established under s. 4 and to include the principal court. Subsection (1) of s. 6 provides:

“6 (1) Subject to any limitation contained in its warrant or in this or any other law, a court may exercise jurisdiction over all causes and matters where, in proceedings of a civil nature, all parties are Africans, or where, in proceedings of a criminal nature, the accused is an African.”

Territorial jurisdiction of “courts” is provided for in s. 8, and s. 9 limits the jurisdiction of “courts” in relation to certain types of cases. The material part of s. 9 in relation to this case is as follows:

“9. Subject to any express provision to the contrary, no court shall have jurisdiction in any proceedings:

.....
(c) taken under any Ordinance or any English or Indian law in force in the Protectorate unless such court has been authorised to administer or enforce such Ordinance or law by the terms of an Ordinance or under s. 12 of this Ordinance;
.....

Section 10 provides:

“10. Subject to the provisions of this Ordinance, a court shall administer and enforce only:

- (a) the provisions of any native law;
- (b) the native customary law prevailing in Buganda on or after the commencement of this Ordinance;
- (c) the provisions of all lawful orders made by a chief in pursuance of native law and custom;
- (d) the provisions of any Ordinance or other law which the court is authorised to administer or enforce by the terms of any Ordinance; and
- (e) the provisions of any Ordinance, applied Act and regulation and any order, rule and proclamation made thereunder which the court may be authorised to administer or enforce under s. 12 of this Ordinance.”

Section 12 (s. 11 is not relevant) provides:

“12. The Kabaka, with the consent of the Governor by order in the *Gazette*, or in the warrant establishing a court, may confer jurisdiction upon any court to administer or enforce all or any of the provisions of any specified Ordinance, applied Act and regulation and any order, rule and proclamation made thereunder, subject to any restriction or limitation that may be imposed by such order or warrant.”

No order made under s. 12 relevant to this case was brought to the notice of this court.

The subsequent provisions of the Ordinance are not relevant, though it may

be mentioned that there is provision for appeal from the principal court to the High Court in certain categories of cases.

Section 7, on which the appellant relies, reads (omitting the proviso which is not material to this case) as follows:

- “7. Where any proceedings of a civil or criminal nature which a court has jurisdiction to try are commenced in a subordinate court or the High Court, they shall be transferred for hearing to a court having jurisdiction.”

As appears from the plaint, both parties are Africans, and the cause of action arose in Buganda. The appellant contends that as compensation for damage caused by negligence can be awarded under native customary law (which is not contested and appears from previous reported decisions), the High Court had no jurisdiction to hear the case but was obliged to transfer it to the principal court under s. 7.

The proceedings in the High Court were, in form, a common law suit for damages for negligence. The respondent contends:

- (a) that, in view of the provisions of sub-s. (1) of s. 15 of the Uganda Order in Council, 1902, s. 7 of the Buganda Courts Ordinance is ultra vires in so far as it purports to deprive the High Court of jurisdiction;
- (b) that consequently concurrent jurisdiction is vested in the High Court and the Buganda courts, and a plaintiff may elect in which court he will proceed;
- (c) that in any case this is an action “taken under” English law, since not only English common law but also statutory law, e.g. Part V of the Law Reform (Miscellaneous Provisions) Ordinance, 1953 (No. 23 of 1953) (which relates to apportionment of liability in cases of contributory negligence) would be applicable; and
- (d) that since the Buganda court is precluded from administering the provisions of that Ordinance by virtue of s. 10 (d) of the Buganda Courts Ordinance, the case is excluded from the jurisdiction of the Buganda courts.

A number of decisions of the High Court on the relevant provisions of the Buganda Courts Ordinance were brought to our notice, and it is evident that the application of those provisions has caused some difficulty. The matter has not, so far as I am aware, been considered by this court before, and it also appears that the question of the validity of s. 7 of the Buganda Courts Ordinance is now being raised for the first time in any court. A decision of this court in 1939 (*W. W. K. Nadiope v. D. M. Mwebe* (2) (1939), 6 E.A.C.A. 44) was referred to, in which it was held that the High Court and the Lukiko Court of Buganda had concurrent jurisdiction. That case, however, was based on the provisions of the law in force before the enactment of the Buganda Courts Ordinance which came into force in 1940. The provisions of the earlier law were entirely different, so the case is of no assistance in relation to the provisions of the Buganda Courts Ordinance.

The earlier case before the High Court to which we were referred was *Yolamu Kaluba v. Kerementi Kajaya* (3), [1957] E.A. 312 (U.). That case, however, was concerned with the position as between the High Court and native courts outside Buganda. It is of no assistance here.

The next case referred to was *Thomas Musoke v. Haji Asumani Seninde* (4), Uganda High Court Civil Case No. 261 of 1957 (unreported). That was a claim for damages arising out of a traffic accident, similar to the instant case, in which an application was made by the defendant for the transfer of the case to the principal court under s. 7 of the Buganda Courts Ordinance. The plaintiff, however, produced a letter

from the Chief Judge, Buganda, refusing jurisdiction

in the case, and, on that, the application for transfer was rejected and the case was disposed of by the High Court.

The next case to which reference was made was *R. v. Ochola s/o Katholi* (5), [1959] E.A. 72 (U.). This was a criminal prosecution under the Penal Code, and related to the jurisdiction of a court established outside Buganda under the Native Courts Ordinance (Cap. 76). The learned Chief Justice, however, approved and applied an earlier decision (*R. v. Yoanna Muigira* (6) (1942), 6 U.L.R. 118) that

“the fact that the offence charged under the Penal Code may at the same time be an offence under native law, cannot make the case triable by a Buganda court, since it has become a proceeding under an Ordinance and is thus specifically excluded by s. 9 (c)”.

Fabiano Bukenya v. David Mutebi and Another (7), [1959] E.A. 366, (U.), was a case in which the plaintiff claimed from the defendants in the High Court the return of Shs. 4,200/- part payment for a motor car which the defendants had failed to deliver. It was pleaded that the High Court had no jurisdiction; and it was argued for the plaintiff that this was a claim under the Sale of Goods Ordinance and that therefore s. 7 of the Buganda Courts Ordinance did not apply. It was held that the Sale of Goods Ordinance was not mentioned in the pleadings and, in fact, need not be invoked; and that the case must be transferred to the principal court. The learned judge said, *inter alia*, at p. 367

“It is extremely difficult to say with certainty what suits are, and what suits are not, triable by African courts. The pleadings of course are a guide, but not conclusive. It depends, I think, whether a plaintiff has to plead and invoke a particular section of an Ordinance to succeed. No general rule can be laid down.”

We were next referred to *B. K. M. Kiwanuka v. Yosefu Wasswa and Others* (8), [1959] E.A. 533 (U.). That case is not directly in point since it referred to mailo land as to which express provision is contained in s. 11 of the Buganda Courts Ordinance. It was held that, in view of the provisions of that section, the case must be transferred to the principal court under s. 7 of that Ordinance. The question of the validity of s. 7 was not raised or considered.

The last case to which we were referred was *Haji Ibrahim Mutyaba v. Arthur Asaph Kalanzi* (9), [1960] E.A. 367 (U.). That was a case almost identical with the instant one, in which it was held that it must be transferred to the principal court in pursuance of s. 7 of the Buganda Courts Ordinance. The learned Chief Justice, in stating the facts, remarked:

“Nor is it disputed that the subject matter of the case, which is a claim for damage to the plaintiff’s motor car arising out of the allegedly negligent driving of the defendant, is of a kind which has been before the principal court on a previous occasion: see *E. K. Muwanga v. R. Mukuta*, (1957) Buganda Customary Law Reports 97.”

After stating the submissions of counsel—that the case was “taken under” English common law, and that the principal court was not empowered to administer English common law—the learned Chief Justice said:

“The question whether the words ‘any English law in force in the Protectorate’, which occur in the passage I have cited from s. 9 of the Buganda Courts Ordinance, cover the English common law as well as any English statutes has not, so far as I am aware, been expressly considered hitherto, but in *Fabiano Bukenya v. David Mutebi* (7), [1959] E.A. 366 (U.), Lewis, J., referred to the common law when considering the meaning of s. 9 of the Ordinance in relation to a claim in contract; he observed:

‘Under what circumstances is a plaintiff justified in saying that the proceedings are ‘taken under’ this or that Ordinance or English common law?’

From this it appears that Lewis, J., took the view that ‘any English law’ would include the common law and was not confined to statutory law. I am certainly of the same opinion, since the common law has been expressly declared to be in force in the Protectorate by the Uganda Order in Council, 1902, art. 15(2).

“But the fact that the plaintiff, in framing his plaint, had in mind a common law cause of action is not an end of the matter.”

The learned Chief Justice then set out the relevant provisions of s. 7 of the Buganda Courts Ordinance and continued:

“The respondent’s argument in the instant case ignores the decisions of this court in which it has been held that, where Buganda customary law provides a remedy, a suit filed in the High Court must be transferred to the principal court (provided the parties are Africans). In *Mugwanyanya v. A. Tamali*, Uganda High Court Civil Case No. 42 of 1957 (unreported), it was held that defamation was known to customary law, and consequently a suit for libel filed in the High Court had to be transferred to a Buganda court. And in *E. Wamala v. A. Musoke*, Uganda High Court Civil Case No. 203 of 1957 (unreported), Bennett, J., held that malicious prosecution was a wrong for which customary law provided a remedy and, consequently, the suit was within the jurisdiction of the principal court and must be transferred to that court. He said:

‘This is not a proceeding taken under any Ordinance or any English or Indian law in force in the Protectorate, since whether the case is tried in this court or in the principal court, the court of trial must be guided by native law having regard to s. 20 of the Uganda Order in Council, 1902.’

“If the principles of those previous decisions are applied to the instant case, the result is that, although the plaintiff’s advocate framed his plaint as a common law action for negligence, this does not constitute it a proceeding taken under the common law for the purposes of the Buganda Courts Ordinance, the parties being persons subject to the jurisdiction of the Buganda courts, and the cause of action being known to Buganda customary law as well as to the common law. Consequently s. 7 of the Buganda Courts Ordinance applies, and it is mandatory to transfer the case for trial to a Buganda court. It would be otherwise if this were a case founded on a cause of action known to the common law but unknown to customary law, since it would then come within s. 9 (c) of the Ordinance and be excluded from the jurisdiction of the Buganda courts.

“Another ground on which the respondent based his objection to this application was that of expediency, but it cannot avail him in the face of the express provisions of s. 7 of the Buganda Courts Ordinance. He argued that cases arising out of motor accidents are of a kind that can more appropriately be tried in the High Court than in the principal court, since advocates are not allowed to appear in the principal court. Consequently, parties to a motor accident case—and insurance companies which stand behind them—are handicapped in the presentation of their cases. That may be so, but there is nothing in the Buganda Courts Ordinance which deprives a Buganda court of jurisdiction merely on the ground that it is a less suitable forum for certain kinds of cases than a British court.”

Subject to the question of the validity of the relevant provisions of the Buganda Courts Ordinance, I would respectfully agree with the reasoning and conclusions of the learned Chief Justice in the *Mutyaba* case (9). It may at first sight seem difficult to reconcile the decision in *R. v. Yoanna Muigira* (6), approved in *R. v. Ochola* (5), with the decision in *Mutyaba*. If, where a cause of action is known to customary law as well as to the common law, the case must be transferred under s. 7, why should not a prosecution taken under an Ordinance not be similarly transferable if the offence charged is one known also to the customary law? There are, I think, two answers, which overlap to some extent. First, where an act constitutes an offence under two or more laws, proceedings against the offender may be taken under any one of those laws, in which case the penalty prescribed by that law is the penalty applicable, and, in those proceedings, no other—cf. s. 36 of the Interpretation and General Clauses Ordinance (Cap. 1). A prosecution, therefore, is essentially “taken under” the law under which the offence is charged, and this alone, in my opinion, is sufficient to bring a prosecution under a provision in an Ordinance within the meaning of s. 9 (c) of the Buganda Courts Ordinance. Secondly, there is a fundamental difference between the application in Uganda of an Ordinance and the application of the English common law. Section 15 of the Uganda Order in Council, 1902, establishes the High Court, and applies the Civil Procedure, Criminal Procedure and Penal Codes of India, and the substance of the common law, the doctrines of equity, and the statutes of general application, in force in England on August 11, 1902, to the territory:

“save in so far as the said Civil Procedure, Criminal Procedure and Penal Codes of India and the said common law, doctrines of equity and statutes of general application . . . may at any time before the commencement of this Order have been or hereafter may be, modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of His Majesty in Council or by any Ordinance or Ordinances passed in and for the Protectorate:

“Provided always that the said common law, doctrines of equity and statutes of general application shall be in force in the Protectorate so far only as the circumstances of the Protectorate and its inhabitants, and the limits of His Majesty’s jurisdiction permit, and subject to such qualifications as local circumstances render necessary.”

The Indian Codes referred to have in fact been replaced by Ordinances. Section 20 of the Uganda Order in Council, 1902, provides:

“20. In all cases, civil and criminal, to which natives are parties, every court (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance, or any regulation or rule made under any Order in Council or Ordinance; and (b) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

The term “native law” is not defined in the Order in Council, but it would seem likely that s. 20 relates to any type of native law, customary or written. For the purposes of this case I will assume, though I do not decide, that the term includes not only native customary law, but also “native law” as defined in s. 2 of the Buganda Courts Ordinance, i.e. a law made by Kabaka and Lukiko in pursuance of the Buganda Native Laws (Declaratory) Ordinance (Cap. 71) and the Agreements there mentioned. I use the term “native law” in this sense in this judgment.

It is clear from the provisions of s. 20 that the English common law, in its application to Uganda in cases to which natives are parties, is subject to native law (except in so far as such native law may be repugnant to justice or morality); but native law is subject, *inter alia*, to the provisions of any Ordinance. In these circumstances, where a case between Africans in Buganda purports to be “taken under” English common law, if the cause of action is known to native law, it is the native law which is to be applied. Whatever the form, the case in substance is, as held in *Mutyaba’s* case (9), a case under native law. On the other hand, since an Ordinance overrides native law in case of inconsistency, where a case is taken under the provisions of an Ordinance those provisions prevail and must be applied, and there need be no reference to the native law on the subject. The case is clearly “taken under” that Ordinance, whatever may be native law on the subject. The result is that, if there is no inconsistency, the prosecutor has a choice whether to proceed under native law or under an Ordinance. In civil cases, in the same way, a suit brought under the provisions of an Ordinance e.g. Part II of the Law Reform (Miscellaneous Provisions) Ordinance, 1953 (which relates to the recovery of damages by surviving members of a family in cases of fatal accidents) is, in my opinion, a suit “taken under” that Ordinance, whether or not there is any corresponding native law.

I turn now to the difficult question of the validity of provisions of the Buganda Courts Ordinance. It appears to me that there are two aspects of this—s. 7, of course, as raised in argument; and also s. 10 (d), which has a bearing on the application of s. 9 (c). I will deal with the latter first.

Section 10 is set out in full earlier in this judgment. The effect of para. 10 (d) for the purposes of the question I am now considering is that a Buganda court has jurisdiction to administer and enforce, apart from native law, only the provisions of an Ordinance which it is authorised to administer and enforce by the terms of an Ordinance. It is not necessary to consider para. 10 (e) and s. 12 for the purposes of the present argument, there being no relevant order made under s. 12. However, under s. 20 of the Uganda Order in Council, 1902, it is mandatory on all courts to be guided by native law only so far as native law is not, *inter alia*, inconsistent with any Ordinance. “Courts” is not defined in the Order in Council, but clearly includes the courts constituted under the Buganda Courts Ordinance since the authority for the constitution of those courts is s. 18 of the Order in Council (the terms of which appear later in this judgment). As I read the Order in Council, every court in Uganda, including native courts and Buganda courts, regardless of the parties, must apply the provisions of an Ordinance in lieu of the provisions of native law where there is any inconsistency between the two. It is suggested that the contributory negligence provisions (Part V) of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, might be applicable in the instant case and might give rise to such a conflict. I am not in a position to say whether or not those provisions are inconsistent with native law; and whether or not the provisions would be applicable would depend on the facts of the case, with which I am not acquainted. It should be mentioned that there is nothing in that Ordinance to restrict its application to non-natives. Other measures which, in other cases, might affect native law that occur to me are the Sale of Goods Ordinance (Cap. 214), which is mentioned in one of the cases referred to above, and the Contract Act (Cap. 207). The latter, it is true, is an Indian Act, but it is applied by order of the Secretary of State under the African Order in Council, 1892, and it seems likely that under s. 15 (2) and s. 20 of the Uganda Order in Council, 1902, it is in the same position as an Ordinance as regards any conflict with native law. That, however, is not a matter for decision in the instant case.

On the assumption that provisions of one or more Ordinances, such as the contributory negligence provisions, being provisions which are inconsistent with native law, would be applicable to a particular case what is the effect of

s. 10 of the Buganda Courts Ordinance? If, reading para. (b) and para. (d) together, the object was to make a suit between Africans triable according to native law notwithstanding the existence of an Ordinance inconsistent with such law, then, in my opinion, the provision is to that extent ultra vires and ineffective. It seems to follow that if any Ordinance exists which is to be invoked in the course of a trial, the effect of para. 10 (d) is to exclude the case from the jurisdiction of the Buganda courts. In the instant case if it appeared that the contributory negligence provisions of the Law Reform (Miscellaneous Provisions) Ordinance, 1953 would be invoked, the case would be excluded from the jurisdiction of the Buganda courts.

I come now to s. 7 of the Buganda Courts Ordinance. The relevant provisions of the Uganda Order in Council, 1902, which have to be considered are sub-s. (1) and sub-s. (2) of s. 15, and s. 18 and, to some extent, s. 20. Section 20 I have already set out above. I have also referred to some of the provisions of sub-s. (2) of s. 15, but it is convenient to set it out here in full. The relevant provisions, other than s. 20, are as follows:

- “15. (1) There shall be a Court of Record styled ‘His Majesty’s High Court of Uganda’ (in this Order referred to as ‘the High Court’), with full jurisdiction, civil and criminal, over all persons and over all matters in Uganda.
- “(2) Subject to the other provisions of this Order, such civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Civil Procedure, Criminal Procedure and Penal Codes of India in force at the date of the commencement of this Order and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 11th day of August, 1902, and with the powers vested in and according to the procedure and practice observed by and before courts of justice and justices of the peace in England according to their respective jurisdiction and authorities at that date, save in so far as the said Civil Procedure, Criminal Procedure and Penal Codes of India and the said common law, doctrines of equity, and statutes of general application, and the said powers, procedure and practice may at any time before the commencement of this Order have been, or hereafter may be, modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of His Majesty in Council or by any Ordinance or Ordinances passed in and for the Protectorate:
- “Provided always that the said common law, doctrines of equity and the statutes of general application shall be in force in the Protectorate so far only as the circumstances of the Protectorate and its inhabitants, and the limits of His Majesty’s jurisdiction permit, and subject to such qualifications as local circumstances render necessary.”
- “18. (1) Courts subordinate to the High Court and courts of special jurisdiction may be constituted by or under the provisions of any Ordinance as occasion requires.
- “(2) Provision may be made by Ordinance for the hearing and determining of appeals from any such court by the High Court or otherwise.”

For convenience, I also repeat the relevant part of s. 7 of the Buganda Courts Ordinance:

- “7. Where any proceedings of a civil or criminal nature which a court has jurisdiction to try are commenced in a subordinate court or the High Court, they shall be transferred for hearing to a court having jurisdiction.”

The question is, can this provision in s. 7 cut down the very wide jurisdiction conferred on the High Court by s. 5 (1) of the Order in Council. It was suggested in argument that s. 15 (2) of the Order in Council conferred power to reduce the jurisdiction of the High Court in view of the words

“save in so far as . . . the said powers . . . may be . . . modified . . . by any Ordinance . . .”.

The words “the said powers”, however, refer to

“the powers vested in and according to the procedure and practice observed by and before courts of justice . . . in England”;

that is to say, the powers to be exercised by a court in dealing with matters before it—not the jurisdiction of the court to deal with the particular matter.

The attention of the court was not drawn to s. 18 of the Uganda Order in Council, 1902, in argument, but clearly that section is the most relevant in relation to the point I am considering. It is under that section that provision has been made by Ordinance for the ordinary subordinate courts of the Protectorate; for the native courts outside Buganda; and for the Buganda courts. It is true that the “recognition” of the principal court is in pursuance of a provision in the Uganda Agreement, 1900. The Uganda (Judicial) Agreement, 1905, may also be mentioned. Effect to those agreements can, however, only be given by legislation, and the only authority of which I am aware to legislate by Ordinance on a matter which may affect the jurisdiction of the High Court conferred by the Order in Council, is s. 18. That section authorises the creation by Ordinance of (a) courts subordinate to the High Court; and (b) courts of special jurisdiction. It would not appear that the creation of a court subordinate to the High Court would normally affect the jurisdiction of the High Court, and it may be noted that the Civil Procedure Ordinance (Cap. 6) takes care to preserve the concurrent jurisdiction of the High Court in cases normally triable by a subordinate court—v. s. 11 (7) of the Civil Procedure Ordinance. Where “courts of special jurisdiction” are concerned, however, the matter is different. It appears to me that the power conferred by s. 18 must include power to prescribe the jurisdiction to be exercised by the special court. I see nothing in the section to restrict such jurisdiction to matters not within the jurisdiction of the High Court. Indeed, in view of the very wide provisions of section 15 (1), it would seem difficult to devise a jurisdiction which did not overlap with the jurisdiction conferred on the High Court. Nor do I see anything in s. 18 to suggest that the jurisdiction vested in a special court must be exercised concurrently with the jurisdiction vested in the High Court. I would hold that it is implicit in the provisions of s. 18 that a “court of special jurisdiction” created by or under an Ordinance under that section may be vested with exclusive jurisdiction in relation to the cases with which it is to deal, notwithstanding the provisions of s. 15(1) of the Order in Council. The Buganda courts are courts designed to apply a particular type of law as between members of a particular class of people. I think they are clearly within the term “courts of special jurisdiction”. It follows that in my opinion the provisions of s. 7 of the Buganda Courts Ordinance are *intra vires*. But it is to be noted that s. 7 does not purport to reduce the jurisdiction of the High Court; it merely makes it mandatory to transfer certain types of cases.

The requirements of s. 7 are that an action in the High (or a subordinate) Court between Africans shall be transferred to a Buganda court if it has jurisdiction. Bearing in mind that the High Court itself has full jurisdiction under the Order in Council, over both the persons and the subject matter, the question arises as to the stage at which effect is to be given to the section. The answer is clearly when the High Court is satisfied that the condition is fulfilled both in respect of the parties and the subject matter. It is the High Court which is

called upon to make the order for transfer and it would not be entitled to do so until it had been satisfied that both parties are Africans (as defined) and that the action is within the jurisdiction of a Buganda court. That might require evidence or it might be ascertainable from the pleadings; but until it is so satisfied the High Court (having jurisdiction) is justified in proceeding with the case.

Various sets of circumstances may be envisaged. In the instant case it is pleaded in the plaint that the parties are Africans, and it is evident that the cause of action arose in Buganda. In my opinion, however, this is not sufficient. Before it can be satisfied that a Buganda court has jurisdiction, the High Court must be satisfied that the court trying the case will not be required to administer and enforce, on behalf of either party, the provisions of any Ordinance. Where pleadings are filed by both parties, it may be evident on the face of them that no provision of an Ordinance will be invoked in the case; in which case it is the duty of the High Court to transfer the case. Where, however, it is possible that the provisions of an Ordinance may be invoked (as in the instant case) it appears to me that it is the duty of the defendant, if he desires the transfer of the case, to satisfy the High Court that such provisions will not be invoked on the facts of the case. Until this is done the High Court cannot be satisfied that the case is one in which the Buganda court has jurisdiction.

In the instant case the appellant has not up to now shown that if the case went to trial the provisions of Part V of the Law Reform (Miscellaneous Provisions) Ordinance, 1953, would not be invoked as a matter of defence. If that had been established to the satisfaction of this court, it might be that the appeal would have to be allowed notwithstanding the appellant's failure to take the point in the High Court. Since, however, he has not done so, it is impossible for this court to say that the principal court has jurisdiction in the case. It follows that in my opinion the decision of the High Court must stand.

I would dismiss the appeal with costs.

Sir Trevor Gould JA: I agree and have nothing to add.

Crawshaw JA: I also agree.

Appeal dismissed.

For the appellant:

JS Mayanja-Nkangi and SJL Zake

For the respondent:

L Lubowa

For the appellant:

Advocates: *S Joshua L Zake*, Kampala

For the respondent:

Binaisa & Kazzora, Kampala

Division: HM High Court of Uganda at Kampala
Date of judgment: 22 December 1961
Case Number: 453/1961
Before: Sheridan J

[1] Criminal law – Corruption – Arrest of bicyclist – Money paid to policeman – No agreement to drop charge – No proceedings subsequently – Whether policeman’s conduct influenced by gift – Ingredients of offence – Penal Code (Cap. 22), s. 78 (1) (U.).

Editor’s Summary

The respondent, a police constable, stopped the complainant who was bicycling for failing to stop at a traffic light showing red. At the police station the respondent released the complainant. The prosecution case and evidence was that this occurred after the respondent had asked for Shs. 10/- from the complainant, who, thinking the Shs. 10/- was bail, handed over the money. He asked for a receipt but the respondent told him to go away. The respondent claimed that he released the complainant on his plea that as a countryman he was ignorant of traffic lights. The magistrate acquitted the respondent of a charge of corruption as a public officer contrary to s. 78 (1) of the Penal Code on the ground that there was no evidence that the respondent had agreed to permit his conduct to be influenced by the gift. On appeal by the Crown.

Held –

- (i) although the respondent did not say that he agreed to drop the charge this was, in fact, what he did.
- (ii) such an agreement need not be in a contractual sense and by his conduct in accepting the money the respondent indicated that he had decided to be influenced by it.

Appeal allowed. Case remitted to the trial magistrate.

No cases referred to in judgment

Judgment

Sheridan J: This is an appeal by the attorney-general against a judgment by a magistrate in Kampala whereby he acquitted the respondent of the offence of corruption of a public officer contrary to s. 78 (1) of the Penal Code, on the grounds that the magistrate erred in law:

- (1) in holding that the respondent had “permitted” his conduct to be influenced by the gift of Shs. 10/- from one Besweri Bagonza (P.W. 1) but had not “agreed to permit” his conduct to be so influenced within the meaning of s. 78 (1) of the Penal Code; and
- (2) in acquitting the respondent of the offence charged when the evidence accepted by him established that the offence had been committed.

The respondent is a police constable. In July, 1961, he was attached to the traffic branch at the Central Police Station, Kampala. On July 10, he stopped Besweri for failing to stop his bicycle at a traffic light showing red. The respondent claimed that he released Besweri after they had reached the police station,

after listening to his plea that as a countryman he was ignorant of the working of traffic lights. The prosecution case was that this was only done after the respondent had asked for and had received Shs. 10/- from Besweri. Besweri, thinking that the money was for bail, asked for a receipt whereupon the respondent told him to go away. In these circumstances the magistrate held that there was no evidence that the respondent had *agreed to permit* his conduct to

be influenced by the gift. The answer to that is that although the respondent did not say that he agreed to drop the charge, this was, in fact, what he did. The agreement does not have to be in the contractual sense. By his conduct in accepting the money he indicated that he had decided to be influenced by it and that constituted the agreement. On the evidence the magistrate should have found the offence proved and he should have convicted the respondent. I remit the case to the magistrate with a direction to enter a conviction and to pass such sentence as he may deem appropriate.

Appeal allowed. Case remitted to the trial magistrate.

For the appellant:

JM Long (Crown Counsel, Uganda)

The respondent in person.

For the appellant:

The Attorney-General, Uganda

The Commissioner of Income Tax v Overland Co Ltd [1961] 1 EA 729 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	12 October 1961
Case Number:	95/1960
Before:	Sir Alastair Forbes V-P, Sir Trevor Gould JA and Madan J
Appeal from:	H.M. Supreme Court of Kenya—Mayers, J

[1] Income tax – Expenditure of a revenue nature – Construction of building financed by debentures – Interest paid on debentures during construction – Ground rent and rates also paid – Whether such outgoings allowable deductions – Expenditure incurred in production of income – East African Income Tax (Management) Act, 1952, s. 14(1), s. 15 – East African Income Tax (Management) Act, 1958, s. 111(1) and (2) – Income Tax Act, 1952, s. 137.

Editor's Summary

The respondent company acquired in 1956 a plot of land for the construction of a multi-storey car-park and to finance the building made an issue of debenture stock and obtained a further loan. During the construction of the building which was completed in 1957 the company paid interest on the debenture stock and loan and also paid ground rent and rates on the plot. The respondent company claimed that these outgoings were either wholly and exclusively incurred during the years of income 1956 and 1957 in the production of income or were expenditure of a revenue nature incurred in connection with the

multiple carpark business before the commencement of the business which, since it would have been admissible if incurred after the commencement of the business, was, as such, an allowable deduction under s. 14 (1) (*m*) of the East African Income Tax (Management) Act, 1952. The Commissioner disallowed the respondent company's claims and his decision having been confirmed by the local committee, the respondent company appealed to the Supreme Court which allowed the appeal so far as the ground rent and rates were concerned. The Commissioner appealed against this decision and the respondent company cross-appealed against the decision that the interest paid was not a permissible deduction.

Held – all the payments were part of the expenditure necessary to acquire and bring into existence a capital asset for the enduring benefit of the company's business and, although only part of the total expenditure so incurred, were nevertheless payments of a capital nature and not allowable deductions.

Appeal allowed. Cross-appeal dismissed.

Cases referred to:

- (1) *Eastman Photographic Materials Co. v. Comptroller General of Patents*, [1898] A.C. 571.
- (2) *Assam Railways and Trading Co. Ltd. v. Inland Revenue Commissioners*, 18 T.C. 509.
- (3) *Law Shipping Co. Ltd. v. Commissioners of Inland Revenue*, 12 T.C. 621.
- (4) *United Collieries Ltd. v. Commissioner of Inland Revenue*, 12 T.C. 1248.
- (5) *Ralli Estates Ltd. v. Commissioner of Income Tax*, [1958] E.A. 165 (C.A.).
- (6) *Vallambrosa Rubber Co. Ltd. v. Farmer (Surveyor of Taxes)*, 5 T.C. 529.
- (7) *British Insulated and Helsby Cables v. Atherton*, [1926] A.C. 205.
- (8) *Commissioner of Income Tax v. African Estates Ltd.*, Kenya Supreme Court Civil Appeal No. 78 of 1959 (unreported).
- (9) *Commissioners of Inland Revenue v. Adam*, 14 T.C. 34.
- (10) *H. J. Rorke Ltd. v. Inland Revenue Commissioners*, [1960] 1 W.L.R. 1132.
- (11) *Ralli Estates Ltd. v. Commissioner of Income Tax*, [1961] E.A. 48 (P.C.).
- (12) *European Investment Trust Co. Ltd. v. Jackson (Inspector of Taxes)*, 18 T.C. 1.
- (13) *Ascot Gas Water Heaters Ltd. v. Duff (Inspector of Taxes)*, 24 T.C. 171.

October 12. The following judgments were read:

Judgment

Sir Alastair Forbes V-P: This is an appeal by the Commissioner of Income Tax (hereinafter referred to as “the Commissioner”) against part of the decision of the Supreme Court of Kenya on appeals by the respondent company (hereinafter referred to as “the company”) from decisions of the local committee in respect of assessments to income tax raised in respect of the years of income 1956 and 1957. The appeals to the Supreme Court were consolidated in that court. The company has cross-appealed against the remainder of the decision of the Supreme Court.

The company is a limited company, incorporated on February 28, 1956, carrying on business in Nairobi. It is authorised by its memorandum of association to carry on various types of business in connection with motor cars. Between January 1, 1956, and July 1, 1957, it carried on a “car-hire business” from temporary premises in Delamere Avenue, Nairobi. A decision was taken by the company to build a multi-storey car-park and, in pursuance of that decision, in order to obtain the necessary capital to cover the cost of such building, the company, in April, 1956, issued first mortgage debenture stock to a value of £70,000; and the company also acquired a plot of land to be used for the proposed building. Thereafter the company obtained a further loan of £25,000 for the purpose of financing the erection of the building. The multi-storey car-park was duly completed, and opened for business in July, 1957, since when both the car-park business and the car-hire business of the company have been carried on from the new building. For the year of income 1956, the interest payable in respect of the debenture stock

amounted to Shs. 30,333/–, and the ground rent in respect of the plot used for the erection of the building amounted to Shs. 30,250/–. For the relevant period of the year of income 1957, the interest payable in respect of the debenture stock and the subsequent loan amounted to Shs. 74,660/–; the ground rent in respect of the plot was Shs. 21,180/–; and rates payable to the municipality in respect of the plot amounted to Shs. 5,660/–. These sums were all disallowed as deductions by the Commissioner, the relevant amount of tax being Shs. 15,145/–in respect of the year

of income 1956, and Shs. 28,713/- in respect of the year of income 1957. The company contended that the sums in question were not liable to tax because they were either (a) outgoings and expenses in the production of income wholly and exclusively incurred during the relevant year of income; or (b) as being expenditure of a revenue nature incurred in connection with the multiple car-park business before the date of commencement of such business, which would have been admissible as a deduction if incurred after such date, and, as such, allowable as a deduction under para. (m) of sub-s. (1) of s. 14 of the East African Income Tax (Management) Act, 1952 (hereinafter referred to as "the 1952 Act").

The Commissioner's assessments were confirmed by the local committee on appeal by the company under s. 111 (1) of the East African Income Tax (Management) Act, 1958 (hereinafter referred to as "the 1958 Act"). On the appeal under s. 111 (2) of the 1958 Act to a judge of the Supreme Court, the learned judge held:

- (a) that the ground rent of, and rates paid in respect of, the plot upon which the appellant's business is now housed were permissible deductions as revenue expenditure under s. 14 (1) (m) of the 1952 Act; and
- (b) that the interest upon the debenture stock and the subsequent loan was not deductible as a revenue expense under that provision.

He accordingly ordered that the assessments be amended to give effect to his finding, and further ordered the company to pay two-thirds of the Commissioner's costs of the appeals to the Supreme Court.

The Commissioner now appeals against the first part of the learned judge's decision; and the company cross-appeals against the second part of his decision. The Commissioner's grounds of appeal are:

- "1. The learned judge erred in holding that the sums paid by the respondent in respect of ground rent and rates on the plot on which the respondent constructed its multi-storied car-park during the period of the construction thereof (namely, between the 1st day of January, 1956, and the 30th day of June, 1957) are permissible deductions under the provisions of section 14 (1) (m) of the East African Income Tax (Management) Act, 1952, as if such expenditure had been incurred on the 1st July, 1957.
- "2. The learned judge erred in failing to hold that:
 - (a) none of the said sums was deductible either in respect of the year of income 1956 or the year of income 1957 under any of the provisions of s. 14 of the East African Income Tax (Management) Act, 1952, or any other provision;
 - (b) that the said sums were expended for a capital purpose and accordingly a deduction in respect thereof was precluded by s. 15 (c) of the said Act."

The company's ground of appeal is:

"That such part of the decision as decides that interest on debenture stock and loans are not allowable deductions of a revenue nature for the purposes of s. 14 (1) (m) of the East African Income Tax (Management) Act, 1952, is wrong in law and should be reversed."

Each party accordingly sought variation of the decision of the learned judge, and consequential variation of the order relating to costs.

In the course of his judgment the learned judge found as a fact that:

"the business of hiring cars was, at least prior to the time when that business commenced to be carried on upon the same premises, as that of

storing cars, a wholly separate business from the business of storing cars, which did not commence until July 1, 1957.”

He accordingly held that none of the charges in question were properly deductible upon the ground that they formed part of the expenses deductible from the income derived from the hiring of cars up to July 1, 1957.

This finding and conclusion were not challenged in the memorandum of appeal or memorandum of cross-appeal. Mr. Bechgaard for the company, commented that it could be argued that there was a case for apportionment between the two types of business carried on by the company, and that the learned judge had overlooked this aspect, but stated he was content to accept the finding of the learned judge. Mr. Summerfield, for the Commissioner, stated that his arguments were based on the assumption that the learned judge’s finding of fact was not challenged. Although Mr. Bechgaard appeared to have reservations as to the learned judge’s finding, I am of opinion that it is not open to either party on this appeal to challenge the finding, and that for the purposes of the appeal and cross-appeal it must be accepted as fact that on July 1, 1957, the company commenced a new business carried on upon the new premises which it had constructed.

The relevant statutory provisions which have to be considered appear in sub-s. (1) of s. 14 and s. 15 of the 1952 Act. Section 14 relates to the deductions to be allowed for the purpose of ascertaining the total income of a person. Sub-section (1) (sub-s. (2) is not relevant) commences:

“(1) For the purpose of ascertaining the total income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year of income by such person in the production of the income, including—”

There follows a series of paragraphs specifying particular types of expenditure which are expressly mentioned as being allowable as deductions. The particular paragraph which has to be considered in this case is para. (m), which I will set out later. Two other paragraphs of s. 14 (1) were referred to in argument and may be set out here, that is to say, para. (a) and para. (b):

“(a) except as hereinafter provided, sums payable by such person by way of interest upon any money borrowed by him, where the Commissioner is satisfied that the interest was payable on capital employed in acquiring the income;

“(b) rent paid by any tenant of land or buildings occupied by him for the purposes of acquiring the income.”

It is to be noted that the opening words of s. 14 are wide enough to include capital expenditure, and in fact items of expenditure which is clearly capital expenditure are expressly mentioned in some of the paragraphs following as allowable deductions. Mr. Bechgaard conceded that the fact that an item of expenditure is mentioned in one of the paragraphs of s. 14 (1) does not necessarily mean that the expenditure is expenditure “of a revenue nature”. The wide general terms of s. 14 are, however, restricted by s. 15, which specifies certain types of expenditure which are not allowable as deductions in the ascertainment of total income unless expressly authorised by the Act. All that need be set out from s. 15 for the purposes of this case are the opening words and para. (c), which read as follows:

“15. Except where otherwise expressly provided in this Act, for the purpose of ascertaining the total income of any person, no deduction shall be allowed in respect of:

.....

“(c) any loss, diminution, exhaustion, or withdrawal, of capital, any sum employed or intended to be employed as capital, or any expenditure for a capital purpose;
.....”

Paragraph (c) of s. 15 is similar to, though not identical with, para. (f) of s. 137 of the English Income Tax Act, 1952 (hereinafter referred to as “the English Act”).

I set out now para. (m) of s. 14 (1) of the 1952 Act (hereinafter referred to as “para. (m)”) which is the provision under which the company claims that the items of expenditure which are in dispute are allowable as deductions in ascertaining the company’s total income:

“(m) expenditure of a revenue nature incurred in connexion with any trade or business before the date of commencement of such trade or business where such expenditure would have been admissible as a deduction if incurred after such date, so, however, that such expenditure shall be deemed to have been incurred on the date on which such trade or business commenced.”

I may mention here that Mr. Bechgaard sought to refer the court to a paragraph (para. 169) of the Report of the Committee on the Taxation of Trading Profits under the chairmanship of Mr. J. M. Tucker, K.C., published in 1951, upon which it is alleged that para. (m) was based. Mr. Bechgaard stated that his purpose in introducing the report (it was apparently referred to in the court below though ignored by the learned judge in his judgment) was to “ascertain the evil which the amendment sought to remedy”; and he referred to, Craies on Statute Law (5th Edn.) p. 123, and the cases there referred to, namely, *Eastman Photographic Materials Co. v. Comptroller General of Patents* (1), [1898] A.C. 571; and *Assam Railways and Trading Co. Ltd. v. Inland Revenue Commissioners* (2), 18 T.C. 509. I have looked at the paragraph in the report to which Mr. Bechgaard referred, and cannot see that there is anything in it to which we can legitimately refer. The only “surrounding circumstances” emerging from the passage in the committee’s report are that complaints had been made to the committee’s about the non-allowance of certain types of expenditure in the existing English income tax legislation. This does not carry the matter of the construction of para. (m) any further. Mr. Bechgaard is really inviting us to construe the section in the light of the recommendation of the committee, and this we are clearly not entitled to do. In my opinion the comment of Lord Wright in the *Assam Railways* case (2), at p. 537, in relation to the report to which the House of Lords were invited to have regard, applies here:

“It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible, and the report of commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted.”

In my opinion we are not entitled to have regard to the report in question, and I propose to pay no regard to it.

I return to consider the expenditure in dispute in relation to para. (m). The expenditure which has to be considered is (a) interest on loan moneys borrowed and used for capital construction; (b) rent of a plot of land during the period it was used solely for the construction of the building erected on it, and (c) rates incurred in respect of the plot during the same period. As Mr. Bechgaard said, there are three matters to be considered under para. (m): first, whether the expenditure in question is of a revenue nature; secondly, whether it was incurred in connection with the particular trade or business before the

date of commencement of such trade or business; and thirdly, whether such expenditure would have been admissible as a deduction if incurred after such date. Each of these three conditions must be satisfied before any particular expenditure is deductible under para. (m).

There is no dispute here as to the second of these conditions: the expenditure of each type which is in dispute was incurred in connection with the company's business and was incurred before the date of commencement of that business.

As to the third condition, Mr. Bechgaard points to para. (a) and para.(b) of s. 14 (1), and argues that all three types—interest, rent and rates—are allowable after the commencement of the company's business. This, as I understood it, was conceded by Mr. Summerfield, though with some reservation in respect of the interest on the debentures and loan. He did not, however, ask us to consider this aspect, and for the purposes of this case I assume that the interest, as well as rent and rates, accruing after the commencement of the company's business, is properly allowable as a deduction.

The whole matter therefore turns on the first condition, namely, was the expenditure in question "of a revenue nature"? In considering this question I do not think s. 15 of the 1952 Act assists since "expenditure for a capital purpose" appears to be merely the antithesis of "expenditure of a revenue nature" and adds nothing to the restriction contained in para. (m). If the expenditure in question is of a revenue nature, it cannot be for a capital purpose; conversely, if it is made for a capital purpose, it cannot be of a revenue nature. In any case, if para. (m) were inconsistent with s. 15, it would, I think, be an express provision which would prevail over s. 15.

I will deal first with the expenditure which is the subject of the Commissioner's appeal, that is to say, the rent and rates attributable to the period before the company commenced business on July 1, 1957. The learned judge in his judgment referred to the judgments of Lord Clyde in *Law Shipping Co. Ltd. v. Commissioners of Inland Revenue* (3), 12 T.C. 621, and of Lord Blackburn in *United Collieries Ltd. v. Commissioners of Inland Revenue* (4), 12 T.C. 1248, and continued:

"The principle upon which it seems to me that Lord Blackburn's observations were based is that a revenue expense must be an expense of such a nature as is incurred for the purpose of keeping a profit earning asset in a condition to earn profits and, therefore, that no expense incurred in bringing a potential profit earning asset into a state in which it becomes an actual profit earning asset can be regarded as a revenue expense in the strict sense of the term. Manifestly this principle cannot apply without qualification as to the instant case inasmuch as s. 14 (1) (m) of the Act expressly relates to expenditure incurred before the commencement of a business, that is to say to expenditure which is incurred for the purpose of converting a potential profit earning asset into an actual profit earning asset. The legislature, however, in using the term 'revenue expense' must be taken to have had regard to the use attached to that term by decided cases. It seems to me that in s. 14 (1) (m) revenue expense means an expense which would have been a revenue expense within the meaning ascribed to that term by decided cases had it been incurred after the commencement of the business in relation to which a deduction is claimed in respect of that expense. If I am right as to that a test to be applied in determining whether an expense is or is not a revenue expense within the provisions of s. 14 (1) (m) is, would it have been a revenue expense had it been incurred after the commencement of business? Mr. Summerfield contends that none of the expenditure to which these appeals relate can be regarded as revenue expenses, first he urges that the ground rent of the plot and the rates were incurred not consequent upon the occupation of the plot for the purposes of the business, against the revenue from which they are alleged

to be a permissible deduction, but were incurred at a time when the plot was occupied for the purpose of constructing the building which was subsequently used for the purpose of the business in relation to which the deduction is sought to be made. This argument seems to me to be fallacious in the instant case. The evidence, which was not sought to be challenged, leaves me in no doubt that the sole purpose of the appellants in acquiring the plot upon which their multi-storied car-park now stands and on which their business is now carried on was to utilise it for the purpose of housing their car-hire business and their multi-storied car-park. In these circumstances I do not think that it can properly be said that during the period that the building was being constructed they occupied it for the purposes of construction of the building. In my view, during that period they occupied it for the purposes of their business and to enable them to carry the purposes of their business into execution, they used it temporarily for the purpose of constructing a building. To illustrate this distinction by an example: if I have lived in a rented house for seven years and under my lease I am obliged to have it repainted at the end of the seventh year and I go to live at an hotel while the house is being repainted, I do not think that it can be said that during the period of repainting of the house it was in my occupation for the purpose of being repainted rather than for the purpose of residence, but rather that it was in my occupation as a residence at all times, although I was temporarily absent from it, during the period of repainting. In my view, therefore, the ground rent of and the rates in relation to the plot upon which the appellants' business is now housed are permissible deductions as revenue expenditure under s.14 (1)(m)."

With great respect, I do not think the learned judge's analogy towards the end of the passage cited is a true one. A truer analogy, it seems to me, would be the case of a plot purchased for the purpose of constructing a residence. During the time the residence is being constructed, can it be said that the owner is occupying the plot as a residence? It seems to me that he would not; but this, of course does not conclude the matter. It comes back to the question what the words "expenditure of a revenue nature" in para. (m) mean.

The question arises as to the extent to which English authorities will afford guidance. There is no provision in English law corresponding to para. (m). It seems to me, however, that the words "expenditure of a revenue nature" bear no special meaning in para. (m) but are to be construed as bearing the same meaning as they do in relation to any expenditure which falls to be considered for income tax purposes; and, as I have said, they are, I think, the antithesis of "expenditure for a capital purpose". We were not referred in argument to the case of *Ralli Estates Ltd. v. Commissioner of Income Tax* (5), [1958] E.A. 165 (C.A.), but nevertheless it seems to me that that case affords some useful guidance in more than one respect. While the facts in that case were very different from those of the instant one, the court was nevertheless called on to consider the distinction between payments of an income and of a capital nature. At p. 172 of the report, the learned President said:

"The question whether payments are of an income or a capital nature has frequently been considered under provisions of the English Income Tax Acts and Rules thereunder, for instance under r. 3 (a) of Schedule D to the Income Tax Act, 1918, which reads:

- '3. In computing the amount of the profits or gains to be charged no sum shall be deducted in respect of (a) any disbursements or expenses not being money wholly or exclusively laid out as expended for the purposes of the trade, profession or vocation.'

“That is not the same wording as is employed in s. 14 of the East African Income Tax (Management) Act, but I think that it and some of the other provisions are sufficiently similar to enable me to obtain guidance from the English authorities as to what are the principles which should be observed in deciding whether a particular payment is of the nature of an income, or of a capital payment.”

I think in the instant case the English authorities likewise afford guidance.

In the instant case Mr. Bechgaard relied strongly on the test to distinguish between capital and revenue expenditure suggested by Lord Dunedin in *Vallambrosa Rubber Co. Ltd. v. Farmer (Surveyor of Taxes)* (6), 5 T.C. 529 at p. 536:

“... in a rough way I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year.”

Mr. Bechgaard conceded that this was not an absolute test; but he drew attention to para. 170 in Vol. 2 of Simon's Income Tax (2nd Edn.) where the *Vallambrosa* case (6), and the judgment of Lord Cave, L.C., in *British Insulated and Helsby Cables v. Atherton* (7), [1926] A.C. 205, were considered. He referred to the “two additional but alternative considerations in dealing with the test suggested by Lord Dunedin” in the *Vallambrosa* case (6), there mentioned, namely, (1) that the expenditure must be with a view to bringing into existence an asset or an advantage, and (2) that for a payment to be a capital item, it has to be made for the enduring benefit of the business; and he stressed the passage towards the end of para. 170 where the learned author says:

“In considering these tests it is essential to bear in mind that no one test is conclusive in any particular case; but if a particular payment or receipt satisfies every test there is at least strong reason for the view that the item in question is capital or revenue according to the result which the tests yield.”

He argued that the disputed expenditure, in particular the rent and rates, in the instant case satisfied all these tests of revenue expenditure: that the payments were recurrent; that they, especially the payments of rent and rates, did not bring into existence any asset or advantage; nor were they made for the enduring benefit of the business; and that therefore they must be held to be revenue expenditure. And he referred to a recent case in the Supreme Court, *Commissioner of Income Tax v. African Estates Ltd.* (8), Kenya Supreme Court Civil Appeal No. 78 of 1959 (unreported), in which in similar circumstances rent paid for a plot during construction of a building was held to be expenditure of a revenue nature. In particular he stressed and relied on the learned judge's dictum in that case that the tests suggested in the *Helsby Cables* case (7), were conjunctive with the test in the *Vallambrosa* case (6).

The relevant passage in the judgment of Lord Cave, in the *Helsby Cables* case (7) (at p. 213 of the report) is as follows:

“But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.”

It is perfectly true that in that case the learned Lord Chancellor was considering a lump sum payment; and his judgment was phrased accordingly. But, with great respect to the learned judge in the *African Estates* case (8), this does not

mean that the tests are to be applied conjunctively in every case. Had the judgment of the learned President of this court in the *Ralli Estates* case (5), been brought to his notice, I cannot think that he would have reached the same conclusion. In the *Ralli Estates* case (5) (at p. 175) the learned President, after setting out the passage from Lord Cave's judgment which is set out above, continued:

"In the *British Insulated and Helsby Cables* case, the payment in question was a lump sum payment, paid once for all; but 'once for all' does not exclude payments by instalments being treated as capital payments. The test (in the absence of special circumstances) is whether the company has secured by the expenditure an advantage for the enduring benefit of its trade."

The learned President then referred to *Commissioners of Inland Revenue v. Adam* (9), 14 T.C. 34, and, after setting out the facts of that case (which I do not think it necessary to repeat here) cited a passage from the judgment of the Lord President, Lord Clyde. *Adam's* case (9), was not referred to in argument before us either, but I think the test suggested by the Lord President is, nevertheless, a valuable one in the instant case. The relevant passage, cited and relied on in the *Ralli Estates* case (5), is as follows (14 T.C. at p. 40):

"The question is whether, in computing the respondent's profits for the purposes of Income Tax, he is entitled to deduct from the gross profits of his business the two instalments of £200 each payable to account of the total price or consideration of £3,200 in each of the eight years. The answer depends upon whether the instalments are wholly and exclusively laid out for the purposes of the respondent's trade within the meaning of sub-head (a) of r. 3 applicable to Cases I and II of Schedule D; or whether on the other hand they are sums employed or intended to be employed as capital in that trade, within the meaning of sub-head (f) of that rule. The point is similar to one which was raised and decided in *Robert Addie & Sons' Collieries Limited v. Inland Revenue*, 8 T.C. 671, where I endeavoured to state the true issue thus: Are the sums in question part of the trader's working expenses, are they expenditure laid out as part of the process of profit-earning; or, on the other hand, are they capital outlays, are they expenditure necessary for the acquisition of property or of rights of a permanent character the possession of which is a condition of carrying on the trade at all?"

A recent case was brought to our attention where it was held that the recurrence of payments did not necessarily invest the payments with a revenue character. This was *H. J. Rorke Ltd. v. Inland Revenue Commissioners* (10), [1960] 1 W.L.R. 1132. The facts, as set out in the headnote to that case, were as follows:

"A company which carried on the business of opencast coal mining entered into an agreement dated December 16, 1957, with a land owner, whereby certain land was let to the company for one year on payment of a royalty for every ton of coal won from the land, the company covenanting to restore the surface of the land on the completion of the opencast mining operations. The company further agreed to pay to the lessor £250 for the right to enter upon the land demised and a further sum of £250 as compensation for the diminution in value of the land and the destruction of land drains, etc. In 1958 the company made two further agreements with landowners in substantially the same terms. The payments for the right of entry and for diminution in value of the land provided for in all three

agreements were a normal and recurrent incident in the trade of opencast coal mining as carried on by the company and others in the industry”.

The learned judge set out the argument for the Crown, which he had to consider, as follows:

“Mr. Bucher, for the Crown, does not dispute that the payments in question were within the words of s. 137 (a) of the Income Tax Act, 1952, ‘wholly and exclusively laid out or expended for the purposes of the trade’. But he says that notwithstanding the transient character of the operations and the constant recurrence of similar payments, they are nevertheless to be regarded as capital payments and so within s. 137 (f). He says that here, what was being acquired by these lump sum payments (or what these payments were helping to acquire) was not stock-in-trade but rights which would enable the company to obtain stock-in-trade—that is to say, coal. They were not payments for the purchase of coal but payments to put the company into the position to get coal. Lump sum payments of that character, he says, are necessarily of a capital nature, and the fact that the leases lasted only for a very short time, that the operations were transient, and that fresh leases were constantly being entered into and payments of this character constantly being made to farmers or landowners is nihil ad rem.”

The learned judge upheld the Crown’s contentions, saying, on the question of recurrence, *H. J. Rorke Ltd. v. Inland Revenue Commissioners* (10), at p. 1142.

“That leaves the question of recurrence which Upjohn, J., left open. Mr. Borneman has, of course, in his favour the finding of fact that the payments made were a normal and recurrent incident in the trade or business of opencast coal mining; and he says truly that the Crown has not been able to point to any case in which in face of a finding that the payments were a normal and recurrent incident in the trade or business in question, it has yet been held that they were capital payments. Logically, however, I cannot see that the recurrence of the payments makes any difference. If once you accept—as I must—the distinction between buying circulating capital and acquiring rights which enable you to get circulating capital, it seems to me that these payments are marked as being of a capital nature, and, if once you find that, the fact that the trader is conducting many transactions of a similar kind cannot really make any difference. In arriving at that conclusion, I get some help from the case of *Eastmans Ltd. v. Shaw*, 14 T.C. 218. The facts were very different, but what Rowlatt, J., said does, I think, tend to support the view that I have taken. Again, if the mere recurrence of similar operations made a difference, a very large concern could apparently be in a better position than a small one, to argue that expenditure of the sort in question was revenue expenditure.”

Mr. Bechgaard contended that *Rorke’s* case (10), did not affect the matter; that it was based on the proposition that there was brought into existence an asset; and that it did not adequately dispose of the recurrent test as the recurrent payments were made to different persons; and he argued, as I have already mentioned, that the payments in the instant case did not bring any asset into existence.

So far as recurrence is concerned, it does not appear to me to be decisive whether the payments in question are made to the same person or to different persons, though, no doubt it is a factor to be considered. It does not, however, affect the test which the learned judge in *Rorke’s* case (10), applied, which, as I understand it, is substantially the test suggested by Lord Clyde in the *Adam* case (9), namely:

“Are the sums in question part of the trader’s working expenses, are they expenditure laid out as part of the process of profit-earning; or, on the other hand, are they capital outlays, are they expenditure necessary for the acquisition of property or of rights of a permanent character the possession of which is a condition of carrying on the trade at all?”

I see nothing inconsistent between this test and the test suggested in the *Helsby Cables* case (7), and a similar test was applied by their Lordships of the Privy Council upholding the decision of this court in *Ralli Estates Ltd. v. Commissioner of Income Tax*, [1961] E.A. 48 (P.C.), when they said at p. 52:

“... you must look at the purpose of the payments. Were they paid in order to acquire a capital asset? Or for a capital purpose? If so, they are capital expenditure.”

I propose to apply the test suggested by Lord Clyde in the instant case, bearing in mind the test in the *Helsby Cables* case (7). If, by that test, the expenditure is of a capital nature, I do not think the fact that it may be recurrent alters the position.

Applying the test in the *Adam* case (9), the question is, were the payments in respect of rent and rates “expenditure necessary for the acquisition of property of a permanent character”

the possession of which was a condition precedent to the company carrying on business at all. Undoubtedly, after business commenced, these payments were expenditure of a revenue character. But it appears to me that, during the time the multi-storied car-park building was under construction, they were part of the expenditure necessary for the acquisition of the multi-storey car-park—the acquisition of the car-park being a condition precedent to the company carrying on its car-park business. To apply the *Helsby Cables* (7) test, undoubtedly the multi-storey car-park was an asset for the enduring benefit of the company’s business. It is true that the rent and rates were not expenditure incurred directly on the construction of the building; but they were, nevertheless, essential expenditure which had to be incurred for the purpose of erecting the building. The fact that a payment may be a mere part, even a negligible part, of the expenditure incurred in bringing into existence an enduring asset, does not take it out of the category of capital expenditure on the test in the *Helsby Cables* case (7). I see nothing which requires that test to be construed as meaning that the expenditure in question must itself alone operate to bring into existence a complete asset. As I see it, and having regard to the test in the *Adam* case (9), the whole of the expenditure on the acquisition of a capital asset is capital expenditure, and every individual part of that whole must likewise be capital expenditure. In my opinion the expenditure by the company on rent and rates during the period of construction is part of the whole sum expended by the company for the purpose of acquiring the multi-storey car-park, and is properly to be regarded as expenditure of a capital, and not of a revenue, nature. It does not satisfy the tests for revenue expenditure in the *Helsby Cables* case (7).

I am fortified in my view by the way the expenditure was in fact treated in the company’s accounts, and by the evidence that it was proper accountancy practice to “capitalise” the expenditure. I agree the court is not bound by the way expenditure is treated in accounts, but here I see no reason to conclude that it should be differently regarded for the purposes of tax. Mr. Bechgaard sought to make a point in relation to the word “capitalise”, to the effect that it meant the transfer of an item which was really a revenue expense item to the capital account. I am, however, unable to see anything in the point. It appears to me that the

expense was properly treated as a capital expense because it was incurred in relation to the bringing into existence of a capital asset.

I revert to para. (m). Does my conclusion mean that the provisions of para. (m) are nullified? In my opinion it does not. As was submitted by Mr. Summerfield in argument, where a business is being started, very considerable expenditure which is properly of a revenue nature may be incurred before the actual commencement of business. To take examples, there may be salaries of staff engaged before the actual commencement of business; or the cost of advertising a new business; or the rent payable in respect of premises during the period intervening between completion and actual opening for business. In my opinion para. (m) is directed to this type of expenditure; expenditure which is truly revenue expenditure being “working expenses . . . laid out as part of the process of profit earning”, but which, but for para. (m), would not be allowable as a deduction if incurred before the commencement of the business. It may be that in the instant case there could have been a case for apportionment of the rent and rates between capital and income expenditure depending on the period, if any, intervening between the completion of the multi-storey car-park, and the opening of the building for business. The statement of facts before the court, however, does not disclose the existence of any such interval, and I think, for the purposes of this case, it must be assumed no such interval in fact intervened.

It follows from my conclusion that in my opinion the rent and rates in dispute are not expenses of a revenue nature and that they do not fall within para. (m); and that I think the Commissioner’s appeal should be allowed.

As regards the cross-appeal, which relates to the interest paid on the debenture stock and loan, the arguments I have put forward in relation to the rent and rates apply. The learned judge dealt with this aspect of the case as follows:

“Quite other considerations apply, however, to the debenture interest. Debenture interest has, I believe, been allowed as a permissible deduction in relation to the period subsequent to July 1, 1957. It is not for me to seek to express any opinion as to whether it has properly been so allowed or no. It seems to me, however, clear that the purpose for which the appellants borrowed the money in relation to which interest became due was that of constructing a capital asset. No doubt their intention was to use that capital asset for the purpose of carrying on the business which they have, in fact, carried on upon those premises. That, however, is beside the point. In the light of the cases to which I have referred it seems to me quite clear that no expenditure which is incurred for the purpose of creating a capital asset or of enhancing the value of an existing capital asset is revenue expenditure. From this it follows that, in my view, interest, whether upon the debentures or upon the subsequent loan from Shell is not deductible as a revenue expense under s. 14 (1) (m).”

I respectfully agree, except as to the existence of a distinction between the rent and rates, and the interest. My difference with the learned judge is that I think that the rent and rates were also “expenditure . . . incurred for the purpose of creating a capital asset.” Mr. Bechgaard however, referred to para. (a) of s. 14 of the 1952 Act, and contended that the learned judge must have overlooked this provision. He stressed the words “capital employed in acquiring the income”, and argued that if the interest on the debenture stock and loan is deductible under para. (a) of s. 14 (1), it is deductible under para. (m).

I think the fallacy of this argument lies in the fact, conceded by Mr. Bechgaard, that the presence of an item in one of the paragraphs of s. 14 (1) does not necessarily mean that the item is expenditure of a revenue nature. Various expenses of a capital nature are allowed as deductions under those paragraphs. As I have already indicated, the opening words of s. 14 (1) may be wide enough

to include capital expenditure; but those general words are restricted by the provisions of s. 15, which, *inter alia*, prohibit deductions in respect of “expenditure for a capital purpose”. But the limitations in s. 15 are themselves subject to any express provision in the Act e.g. in a paragraph of s. 14 (1). Consequently assuming—I do not have to decide—that the interest on the debenture stock and loan is properly allowable as a deduction under para. (a) of s. 14 (1), this does not necessarily mean that such interest is expenditure “of a revenue nature” within para. (m).

We were referred, *inter alia*, to *European Investment Trust Co. Ltd. v. Jackson (Inspector of Taxes)* (12), 18 T.C. 1, which is an authority for the proposition that—apart from express provision such as is contained in para. (a) of s. 14 (1)—by para. (f) of s. 137 of the English Act (which, as I have already indicated, corresponds to para. (c) of s. 15 of the 1952 Act) no sum is deductible, not only in respect of any sum employed as capital in a trade, but also in respect of interest paid on such capital sum—that is, that the interest on such a capital sum is itself expenditure of a capital nature.

Mr. Bechgaard stressed that the learned author of Simon’s *Income Tax* (2nd Edn.) Vol. 2 at p. 245, casts doubt on the validity of the decision in the *Investment Trust Co.* case (12); and he also referred to p. 240 of the same volume of Simon where, in relation to the proposition that annual interest and payments are not deductible under the English Act, the learned author says:

“The reason for this prohibition arises from the system of collection of tax by deduction at the source.”

This latter observation, however, is made in relation to the existence of para. (1) of s. 137 of the English Act. There is no corresponding paragraph in the 1952 Act, but the existence of the paragraph and the reason for it does not affect the application of para. (f) of s. 137 of the English Act or the corresponding para. (c) of s. 15 of the 1952 Act. As regards the *Investment Trust Co.* case (12), it is to be noted that, as the learned author of Simon remarks at p. 245 of Vol. 2, that decision has been applied in subsequent cases, e.g. in *Ascot Gas Water Heaters Ltd. v. Duff (Inspector of Taxes)* (13), 24 T.C. 171. It is true that the Court of Appeal in England decided the *Investment Trust Co.* case (12), as a question of fact, but Romer, L.J., made the following observations (18 T.C. at p. 16):

“In one sense, it is perfectly obvious that the moneys borrowed by the appellants from the Finance Corporation of America constituted capital; that is to say, they were capital sums as distinct from sums representing income and, if one were entitled to treat the words of r. 3 (f) literally, then it would be plain, I think, that the interest on these sums is not deductible, inasmuch as they are sums employed as capital in the trade. But unfortunately, that easy way out of the difficulty does not seem to me to be any longer open to this court—perhaps, to any court—and for this reason that, in the case of the *Scottish North American Trust Limited v. Farmer*, 5 T.C. 693, a trading company, whose business it was to buy, and re-sell at a profit, investments, borrowed from a bank, for the purposes of enabling it from time to time to purchase the investments which it was going to resell, large sums of money. Whether the money was borrowed from a bank or from a finance corporation seems to me quite immaterial. The House of Lords, affirming the decision of the Court of Session in Scotland, held that the moneys so borrowed were not sums employed as capital in the trade, within the meaning of what then, I think, corresponded to r. 3, sub-r. (f). In point of fact, the money which was held not to be capital—although it was capital, as I say, in the sense that it was not income—was, really, what is frequently referred to as circulating capital. But, again, it

is impossible, I think, to treat the decision of the House of Lords as laying down that capital, which is used as circulating capital, is not capital within the meaning of sub-r. (f). To start with, they did not, in terms, draw any distinction between circulating capital and fixed capital, and, in the next place, they did not overrule, although they commented upon, the decision in the *Anglo-Continental Guano Works v. Bell*, reported in 3 T.C. 239, where money that, so far as I can see, was borrowed and used as a circulating capital, was treated as capital within the meaning of sub-r. (f). The only conclusion that I can draw from those cases, therefore, is this, that, in each case, it is a question of fact whether the capital money borrowed is or is not capital employed in the trade within the meaning of this sub-paragraph, and if the Commissioners have decided, as a question of fact, that it is, then this court cannot interfere.”

The difficulty in regard to the *Investment Trust Co.* case (12), appears to be the drawing of the dividing line between

“money which represents mere financial facilities such as a bank over draft, or money which represents long term borrowing, so that, in effect, the capital of the business is expanded.”

(Simon Vol. 2, p. 244–5). Where money borrowed is properly regarded as sums employed as capital in the trade under para. (f) of s. 137 of the English Act, it seems to be accepted that the interest on such sums is also to be regarded as capital. In the instant case there is no doubt whatever that the moneys raised on the debenture stock and the loan were capital used to bring into existence a capital asset. In my opinion the interest on such moneys is also to be regarded as expenditure of a capital nature and so not within para. (m).

For the reasons I have given I would allow the appeal with costs, and dismiss the cross-appeal with costs. I would set aside the judgment and decree of the Supreme Court in so far as it relates to rent, rates and costs, and substitute an order dismissing in toto the appeals from the local committee, and ordering that the Commissioner’s costs in the Supreme Court be paid by the company.

Sir Trevor Gould JA: I agree with the reasoning and conclusions of the learned Vice-President and with the orders proposed by him.

Madan J: I am in agreement with the judgment of the learned Vice- President, and have nothing to add. I agree that the orders proposed by him should be made.

Appeal allowed. Cross-appeal dismissed.

For the appellant:

JC Summerfield (Deputy Legal Secretary, E.A. High Commission)

For the respondent:

K Bechgaard QC and *AB Patel*

For the appellant:

Advocates: *The Legal Secretary, E.A. High Commission*

For the respondent:

AB Patel, Nairobi

Marie Ayoub and others v the Standard Bank of South Africa Limited and

**another as Executors of the
Estate of Christos Galanos
[1961] 1 EA 743 (CAN)**

Division: Court of Appeal at Nairobi
Date of judgment: 2 October 1961
Case Number: 33/1960
Before: Sir Kenneth O'Connor P, Sir Trevor Gould and Newbold JJA
Appeal from: H.M. Supreme Court of Kenya—Miles, J

[1] Trust and trustee – Resulting trust – Property owned beneficially by appellants – Legal estate vested in trustee – Property transferred to purchaser with knowledge of appellants' interest – Purchaser not required to pay price – Collateral agreement between purchaser and appellants to pay price less sum due to him – Whether resulting trust – Claim by sub-lessee against purchaser – Claim compromised by purchaser's executors – Whether executors entitled to deduct sum paid to sub-lessee from price due to appellants – Land Control Ordinance, s. 7 and s. 46 (K.) – Crown Lands Ordinance, s. 88 (K.) – Indian Evidence Act, 1872, s. 32 (3) and s. 92 – Eastern African Court of Appeal Rules, 1954, r. 76 (2) – Civil Procedure (Revised) Rules, 1948, O. VI, r. 2, r. 24; O. XIV, r. 1 (5) and r. 3 (K.).

[2] Practice – Agreement by counsel during trial – Agreement to contest trial on one issue – Whether counsel bound by agreement.

Editor's Summary

The appellants were all members of the Ayoub family. The second appellant was the wife of G. and the third appellant the wife of H. The respondents were the executors of the will of G. Prior to November 1955, H. was registered as lessee of certain Crown land called the Cranhurst Estate. It was accepted that he held the lease as trustee for the four appellants, who were beneficially entitled to it. By a transfer dated November 11, 1955, H. transferred the lease to G. for an expressed consideration of Shs. 300,000/-, receipt of which H. acknowledged but it was common ground that no consideration was either paid or intended to be paid. On November 12, 1955, an agreement was made between G. and the appellants which recited that the estate had been purchased by the appellants and registered in the name of H., that the Land Control Board had refused to allow registration of the appellants as owners and G. had agreed to take it over and have it registered in his name. Further recitals recorded that on November 12, 1955, a sum of approximately £11,000 was due to G. and that although a transfer of the estate from H. to G. was being registered, the total purchase money was not being paid, as G. thereby admitted, notwithstanding that the formal transfer to G. recorded a full receipt, and that the appellants were entitled to one quarter each of the benefit of any sums which might become payable under the agreement. Clause 1 of the agreement provided that G. should pay to the appellants a sum representing the difference between the sale price of the estate and "any sums which shall be due" either to G. personally or to Tongoni Plantations Ltd., such sum to be paid within seven days from completion of a sale. By cl. 2 the appellants agreed, pending a sale, to take no action "to recover the sum due under this agreement", and, by cl. 3, if G. died before the sale of the estate, his executors were directed not to sell unless the price was agreed by

the appellants and that the executors should thereafter account to them in accordance with the agreement. The estate had in 1954 been leased to one Z. and on January 18, 1956, G. as registered owner re-entered the estate evicting Z. without due process of law, claiming the right to do so on

certain grounds. In January, 1956, Z. sued G. for wrongful re-entry, and large damages. On May 5, 1957, G. sold the estate for £35,000 payable as to £5,000 down and the balance by annual instalments of £5,000 per annum. On June 29, 1957, G. died. The respondents were then substituted as defendants and on August 15, 1958, they compromised the claim of Z. by paying him an inclusive sum of £7,450. The respondents, as executors, claimed to be entitled to deduct this sum in addition to the £11,000 due to G. from the proceeds of sale of the estate. The appellants denied this right to recoupment and on August 11, 1959, sued for a declaration that the respondents were not entitled to deduct this sum from the proceeds of the sale. The appellants pleaded the agreement and stated that it had thereby been agreed, *inter alia*, that G. should pay the sums mentioned to each of the appellants “who were beneficially entitled to the estate to the extent of one quarter each”. This was by leave amended at the hearing to read “who had been beneficially entitled to the estate”, meaning during the trusteeship of H. and before the transfer to G. The respondents admitted the agreement and maintained that the appellants were bound by the settlement with Z. which was for the benefit of the appellants, that the appellants had agreed to be liable for the costs and any payments incidental to the action by Z., and that they were estopped by their conduct from denying their interest in the settlement with Z. At the trial counsel for the respondents abandoned the defences of estoppel and agreement and stated that their case would be that there was a resulting trust. The court then framed two issues, namely, whether the respondents were trustees and entitled to deduct the sums concerned, and if not, whether they were entitled to deduct the sums under the agreement of November 12, 1955. After an adjournment counsel intimated that it had been agreed between them that the only point for decision was whether G. was a trustee of the estate or not; if he was, the appellants were not entitled to the declaration sought; if he was not a trustee, the appellants were entitled to succeed. Extrinsic evidence was then admitted to assist in the construction of the documents after which counsel for the appellants applied for the issues to be changed, to which counsel for the respondents objected, and the trial judge held that counsel were bound by the agreement they had made. The trial judge found that H. had been a trustee, that G. had acquired the estate from him without payment and with knowledge of the outstanding equities and was also a trustee. He held that if the agreement created a trust, the transaction was illegal; but that it was not necessary for him to decide the case on that ground, since it was conceded that if the instrument did amount to a trust, the appellants were not entitled to the declaration claimed and that the action failed. On appeal, counsel for the appellants submitted, *inter alia*, that the trial judge erred in framing the first issue, as this was not raised on the pleadings, or, alternatively, in framing it without amendment of the defence, and that the trial judge misconstrued the agreement. He further submitted that in view of counsel’s agreement and in the absence of appropriate pleadings it was not open to the respondents to rely on any other trust, and that the trial judge was wrong in holding that there was a resulting trust, that once one specific issue had been agreed upon, it was wrong to take the view that even if the agreement did not create a trust certain other facts not pleaded gave rise to an independent trust, and that the court was tied by the agreement between counsel.

Held – [Per Sir Kenneth O’Connor, P. and Sir Trevor Gould, J.A., Newbold, J.A., dissenting]:

- (i) the submission that unless the agreement was itself to be construed as creative of a trust, either express or implied from the language employed, by way of settlement or declaration by G. as a full beneficial owner, the declaration asked for must be made, was too narrow and artificial; the court was satisfied that what both counsel had in mind was whether the arrangements effected by the

transfer and the agreement resulted in the relationship of trustee and beneficiaries between G. and the appellants or in some other relationship such as debtor and creditor.

- (ii) evidence of surrounding circumstances was admissible in this case to enable the court to ascertain and give full effect to the intention of the parties when they executed the transfer and the agreement.
- (iii) the judge was right in holding that on the construction of the agreement and the transfer, G. was in effect constituted a trustee; the transfer without consideration inevitably clothed him with that role unless a contrary intent could be drawn from the agreement and the surrounding circumstances.
- (iv) the judge was right in refusing the declaration sought.
- (v) [Per Sir Kenneth O'Connor, P.]: the language of the first three recitals to the agreement disclosed the existence of a trust by implication of law and there was nothing in the operative part of the agreement inconsistent with that position; H. had only a legal estate and could convey nothing but a legal estate to a transferee who had notice of the equities.

Appeal dismissed.

Cases referred to:

- (1) *Cole v. Lejeune*, [1951] W.N. 353.
- (2) *Mills v. Dunham*, [1891] 1 Ch. 576.
- (3) *Rodger v. The Comptoir d'Escompte de Paris* (1869), L.R. 2 P.C. 393.
- (4) *Fowkes v. Pascoe* (1875), L.R. 10 Ch. App. 343.
- (5) *Stock v. McAvoy* (1872), L.R. 15 Eq. 55.
- (6) *Re Grimthorpe's Will Trusts*, [1958] 1 All E.R. 765.
- (7) *Cannon v. Villars* (1878), 8 Ch. D. 415.
- (8) *Hart v. Hart* (1881), 18 Ch. D. 670.
- (9) *N.E. Railway Co. v. Hastings (Lord)*, [1900] A.C. 260.
- (10) *Cook v. Fountain*, 36 E.R. 984.
- (11) *Standing v. Bowring* (1886), 31 Ch. D. 282.
- (12) *Smith v. Cooke*, [1891] A.C. 297.
- (13) *Central Trust & Safe Deposit Co. v. Snider*, [1916] 1 A.C. 266.

October 2. The following judgments were read:

Judgment

Sir Trevor Gould JA: This is an appeal from a judgment of the Supreme Court of Kenya at Nairobi.

At some time prior to November, 1955, one Leslie Norman Hurley became the registered lessee of the

Crown lease of land called the Cranhurst Estate (hereinafter called “the estate”). Hurley was the husband of the third plaintiff and it is common ground that he held the lease as trustee for the four plaintiffs, who were beneficially entitled to it. The plaintiffs were all members of the Ayoub family, and the second plaintiff was the wife of one Christos Galanos. By a transfer dated November 11, 1955, Hurley transferred the lease to Christos Galanos for a consideration expressed in the instrument to be Shs. 300,000/-, but it was common ground that no consideration was in fact paid or intended to be paid.

An agreement dated November 12, 1955, was entered into between Christos Galanos of the one part and the four plaintiffs (in the agreement referred to as “the Ayoub family”) of the other part, and contained the following material provisions:

“Whereas

- “(1) An estate known as Cranhurst Estate (hereinafter referred to as ‘the estate’) and being land reference number 7532 S.W. of Thika Township in the said Colony of Kenya was purchased by the Ayoub family and registered in the name of the husband of the party of the fourth part namely Leslie Norman Hurley.
- “(2) The Land Control Board has refused to allow the Ayoub family to have the farm registered in their names and Mr. Galanos has agreed to take over the farm and have the same registered in his name.
- “(3) At the date of this agreement there is due to Mr. Galanos or Tongoni Plantations Limited a sum of approximately eleven thousand pounds. Although the transfer of the estate from the said Leslie Norman Hurley to Mr. Galanos is being registered the total purchase money is not being paid as Mr. Galanos hereby admits notwithstanding a full receipt having been given in the formal transfer of the estate from the said Leslie Norman Hurley to Mr. Galanos.
- “(4) The Ayoub family and each of them hereby declares that they are entitled to one quarter each of the benefit of any sums which may become payable under this agreement.

“Now it is Hereby Agreed and Declared as follows:

- “1. Mr. Galanos shall pay to the Ayoub family a sum which shall represent the difference between the sale price of the estate and any sums which shall be due to either Mr. Galanos personally or to Tongoni Plantations Limited such sum to be paid within seven days of the completion of a sale.
- “2. Pending a sale the Ayoub family and each of them hereby agree that they will not take any action whatsoever to recover the sum due under this agreement.
- “3. In the event of the death of Mr. Galanos before a sale of the estate Mr. Galanos hereby directs that his executors shall not sell the farm unless the price is agreed by the Ayoub family and each of them and thereafter account to the Ayoub family in accordance with the terms hereinbefore stated.”

In 1954 Hurley had subleased the estate to one Christos Dimitri Zagoritis, and in January, 1956, Zagoritis and another commenced an action against Galanos, claiming damages for wrongful re-entry upon and their eviction from the estate. During the pendency of that action, viz. on March 5, 1957, Galanos sold the estate for £35,000, payable as to £5,000 on the signing of the agreement and thereafter by six yearly instalments of £5,000 each. Christos Galanos died on June 29, 1957; his executors, who are the defendants in the present action settled the Zagoritis action by paying Shs. 133,000/- and costs on August 15, 1958. The dispute which thereafter arose and which resulted in the present proceedings was whether the moneys paid on the settlement of the Zagoritis action were deductible by the defendants, as executors of Galanos from the proceeds of the sale of the estate in addition to the sum of £11,000 mentioned in the agreement of November 12, 1955 (hereinafter called “the agreement”).

I come now to the pleadings and to certain events during the trial which had the effect of limiting the matters which fell to be considered by the learned judge in delivering his judgment. I would say at once that this is a case which exemplifies and emphasizes the importance of having cases decided upon clear cut issues derived from, or if the issues are separately formulated, based upon, pleadings which leave no doubt as to the cases upon which the parties rely. The claim in the plaint was for a declaration that the defendants were not

entitled to deduct from the proceeds of the sale of the estate any of the moneys relating to the settlement of the Zagoritis action or any of the costs thereof. The agreement was pleaded as follows, in para. 3:

- “3. By an agreement in writing dated November 12, 1955, made between the said Christos Galanos deceased and the plaintiffs it was agreed that in consideration of an estate known as Cranhurst Estate land reference number 7532 (hereinafter called ‘the estate’) being registered in the name of the said Christos Galanos deceased and of the transfer in favour of the said Christos Galanos deceased acknowledging full payment of the purchase price for the estate despite the fact that the said purchase price had not been paid the said Christos Galanos deceased should pay to each of the plaintiffs who were beneficially entitled to the estate to the extent of one quarter each of a sum representing the difference between the sale price of the estate and any sums which should be due to either the said Christos Galanos personally and/or to Tongoni Plantations Limited such sum to be paid within seven days of completion of a sale of the estate. The said agreement further provided that in the event of the death of the said Christos Galanos deceased prior to a sale of the estate the executors of the said Christos Galanos deceased should not sell the said estate without the agreement of each of the plaintiffs as to the price at which the estate was to be sold and that the executors of the said Christos Galanos deceased should account to the plaintiffs in accordance with the said agreement. The plaintiffs will crave leave at the trial to refer to the said agreement for its full tenor meaning and effect.”

The history of the matter as I have outlined it above and the existence of the dispute, were related in the other paragraphs. This court was informed that at a late stage of the trial an amendment of para. 3 was asked for and allowed, substituting the words “had been” for the word “were” prior to the phrase “beneficially entitled”. The judge’s note confirms this. In spite of this order the record of appeal shows the plaint in its original form. A failure to amend after order may well have certain technical consequences under O. VI, r. 24, of the Civil Procedure (Revised) Rules, 1948, but I would like also to quote from the judgment of Evershed, M.R., in *Cole v. Lejeune* (1), [1951] W.N. 353, where he said:

“It is, however, important that the record should be in order when the case comes before this court, and the more so since the matters upon which appeal lies to this court from the county court are strictly limited by statute. What I desire to say in the plainest terms is this: the judge having ordered an amendment of the pleadings, it was the duty of the court and of counsel to see that that amendment was effected, and that the record was put in order. We have now done that. The claim has been amended in certain respects which make it show as a pleading that it covers an allegation of licensor and licensee as well as that of landlord and tenant.

“Pleadings are not invented to ensnare litigants, who are unaccustomed to the intricacies of the law: they are made to formulate the issues which the court has to determine; and it is therefore of the utmost importance, when a matter of this kind is settled by the judge’s allowing an amendment, that the record be put in proper order.”

This passage bears not only upon the inconvenience and possibility of error arising from incorrect records on appeal, but upon what I said earlier on the subject of clarity of pleading.

The written statement of defence admitted the agreement, but made no other admissions in respect of para. 3 of the plaint. Paragraph 4, para. 5 and para. 7 of the written statement of defence were as follows:

- “4. The defendants maintain that the plaintiffs are bound by the said settlement referred to in para. 8 of the plaint and that all payments made by the defendants in connection with the said settlement including the costs of the advocates for the deceased and also the costs of the advocates of the defendants in connection with Cranhurst Estate generally and in connection with S.C.C.C. No. 99 of 1956 in particular are properly deducted from any purchase moneys which have come or are coming into the hands of the defendants from the purchaser of Cranhurst Estate.
- “5. The settlement and costs referred to in para. 8 of the plaint were for the benefit of the plaintiffs and each of them and the plaintiffs agreed with the defendants that they, the plaintiffs, would be liable for any payments incidental to the said suit including costs.
- “7. The defendants will contend that the plaintiffs by their prior conduct are estopped from denying their interest in the settlement, and in the outcome of the court proceedings referred to in the previous paragraph.”

When the case came on for trial, Mr. O'Donovan, for the defendants, submitted that the plaint disclosed no cause of action. He argued that the implications of para. 3 in law were that the plaintiffs were the beneficial owners of the estate and that therefore Galanos was a trustee at the time of his death. Only if the settlement of the Zagoritis action by the defendants amounted to a breach of trust would liability fall on the estate and the plaintiffs could not succeed on that basis because no breach of trust had been pleaded. Mrs. Kean, for the plaintiffs, said that there was no allegation of trusteeship or breach of trust. The basis of the claims was the agreement to pay certain moneys upon sale of the estate. Mr. O'Donovan replied that the court was bound to read into para. 3 of the plaint a resulting trust. The trial judge disallowed the preliminary objection giving his reasons in the final judgment as follows:

“I took the view that it was arguable that the agreement might be construed as an agreement for sale and that if so the consequence would be that the defendants would not be entitled to deduct the sums in question. O. VI, r. 29, only requires a plaint to disclose a ‘reasonable’, that is to say an arguable cause of action and I therefore overruled the objection.”

After the ruling, Mr. O'Donovan said that neither estoppel nor agreement (the grounds set out in para. 5 and para. 7 of the written statement of defence respectively) were being pursued; his case would be that there was a resulting trust. The trial judge then framed the following issues:

- “(1) Whether the defendants are trustees and entitled in that capacity to deduct the sums involved in the settlement of Court Case No. 99 of 1956.
- “(2) If not whether they are entitled to deduct the said sums under the agreement of November 12, 1955.”

Mrs. Kean then opened the case for the plaintiffs, after which she is recorded in the trial judge's note as saying:

“I did not come prepared to argue case on basis of trustee. I ask for adjournment. This may shorten case.”

There was no objection by Mr. O'Donovan and the case was adjourned until the following day. When the court resumed, the transfer from Hurley to Galanos was put in by consent and it was arranged that Mr. O'Donovan should interpose a witness, Mr. W. P. Holder, one of the defendants. Mr. Holder then gave evidence at some length and immediately following his testimony there is a portion of the judge's notes which reads as follows:

“O’Donovan: Either Galanos is beneficial owner who can do what he likes or he is trustee. Issue is very narrow.

“Kean: If it is conceded that if no trust I must concede there is little between us.

“O’Donovan: If he is liable to account for profits he is entitled to be indemnified. He must be trustee. In construing phrase ‘which shall be due’ court may look at evidence.

“Adjourned to 2.15 p.m.

“2.15 p.m.

“Mrs. Kean: Now agreed that only point for decision is whether the agreement of 12.11.55 taken with the transfer constitutes a trust, i.e. whether Galanos deceased was a trustee of the estate. If he did hold as trustee it is agreed that the plaintiffs are not entitled to the declaration. If he did not hold as trustee it is agreed that plaintiffs are entitled to the declaration.”

This agreement which apparently was arrived at between counsel during the luncheon adjournment, narrowed the issue substantially. The effect seems to have been that if it were held that there was no trust Mr. O’Donovan could not rely upon any other interpretation of the agreement, and if there were a trust the plaintiffs’ claim failed without any need for the court to consider whether the Zagoritis settlement amounted to a breach of that trust. Mrs. Kean obviously had in mind the two documents, the transfer from Hurley to Galanos and the agreement, but does not appear to have restricted the agreement between counsel to any particular type of trust, for the words “i.e. whether Galanos deceased was a trustee of the estate” are quite general.

There followed argument as to whether extrinsic evidence was admissible to assist in the task of the construction of the documents, and the ruling of the trial judge was as follows:

“Ruling. In my opinion there is a latent ambiguity in the words ‘any sums which shall be due’ within the meaning of s. 93 of the Indian Evidence Act. The construction of this phrase is necessary in order to decide whether there is a trust. I rule that extrinsic evidence of facts which would show the meaning is admissible.”

A witness was then called for the plaintiffs and their case was closed. Mr. O’Donovan then submitted argument and the case was adjourned to the following day. It is necessary to set out at some length the trial judge’s note of the proceedings when the court resumed. I have taken this from the learned judge’s manuscript notes. There are some inaccuracies in the typed transcription in the appeal record.

“27.11.59.

“Mrs. Kean: I ask leave to correct para. 3 of plaint by substituting ‘had been’ for ‘were beneficially entitled’.

“No objection by O’Donovan.

“Order: Amendment as prayed.

“Mrs. Kean: I apply for issues to be changed and defence properly amended. The case for plaintiffs was never that the relationship of trusteeship existed. Defence was agreement and estoppel. Basis of trial completely changed. I may have injured my case. If defence had been that they were entitled as trustees to make the deductions they would have to show they acted reasonably. Order VI, r. 2.

“Court still has power under O. XIV, r. 5 (1), to amend issue. I ask issues to be struck out and for pleadings to be amended.

“O’Donovan, Q.C.: Mrs. Kean and I reached agreement yesterday that if defendants were trustees the action failed and if it were not the action succeeded. I do not release my friend from that agreement—not unfair. This is an agreement on what are certain automatic consequences.

“Order XIV, r. 1 (5). Examination of parties or advocates. Trust is not a legal but an equitable relationship. Construction of agreement of 12.11.55 is one which does arise on pleadings. It would have been sufficient if only second issue framed. My case is that under that agreement the expense was deductible because defendants were trustees. Defence does expressly raise issue as to meaning of agreement. Far too late to resile from a position in which Mrs. Kean fully concurred. She is driven to meeting argument that plaint disclosed no cause of action. Any act by a trustee falling short of standard required is a breach of trust. Order VI, r. 2—nobody can raise breach of trust unless pleaded. Paragraph 528, Halsbury, Vol. 33. Plaintiff cannot raise (illegible) further issues. Trial should not be as to whether trustees have acted properly. Case has proceeded on only issue relevant on pleadings.

“Kean: I do not wish to address court further. Agreement was on basis of first two issues to which I objected.

“Court: In my view on the pleadings the issue as to the construction of the agreement of 12.11.55 is clearly raised. The only issue which arises in this case is whether the agreement creates the relationship of trustee and (illegible) cestui que trust. I see no necessity for amending the issues.”

The purpose of the amendment asked for there, is not entirely clear. Presumably it was to lay a foundation for counsel’s next submission (which, if successful, would have necessitated a new alignment of evidence and argument on both sides) by making it clear that no admission of a trust was intended by para. 3 of the plaint. The submission having failed, I do not think anything turns upon the amendment, for the sole issue at that stage of the trial, trust or no trust, was to be determined by the construction of the documents and the evidence and not by any supposed admission. The trial judge clearly held that Mrs. Kean was bound by the agreement between counsel, and I would emphasize that the correctness of his decision in this respect has not been made a ground of appeal, though it was included in proposed additional grounds which were apparently contemplated, but were not pursued. As to the words used by the trial judge in his ruling, I am satisfied he did not intend to refer to the agreement to the exclusion of the transfer from Hurley to Galanos, which was specifically mentioned in the agreement. The emphasis was on the agreement in my opinion, as the guide to the intention of the parties in relation to the capacity in which Galanos took the estate under the transfer. In his judgment the trial judge did mention the transfer when he said:

“After the conclusion of the evidence it was agreed by counsel on both sides that the point for decision was whether the agreement taken with the transfer constitutes a trust with the consequence that if Galanos did hold as a trustee the plaintiffs were not entitled to the declaration, while if he did not the plaintiffs would be entitled to the declaration.”

“This was in my view clearly the right approach to the case.”

There would appear to be a slight and immaterial inaccuracy in that passage, for the agreement between counsel was arrived at before the evidence was completed.

Having dealt in his judgment with certain of the arguments, the trial judge expressed his conclusions in the following paragraph:

“The position seems to me to be this. It is clear from recital (1) in the agreement that Hurley was in fact a trustee. Galanos purchased from a person whom he knows to be a trustee. He acquired the estate without payment and with knowledge of the outstanding equities. Even if there were a payment Galanos had knowledge of the outstanding equities. There is nothing in the agreement to exclude a resulting trust and the arrangement was connected with such a trust. Any other construction would have the consequences which could never have been intended by the parties, least of all by the plaintiffs. It would mean that the plaintiffs, whose only asset was this estate were in effect making a present of it to Galanos who was, according to the evidence, a multi-millionaire. He could keep it as long as he wished without any obligation on his part to manage it properly. No court could interfere whatever acts of waste he committed. He could have let the estate at a pepper-corn rent to Tongoni Plantations Limited or to any other person.”

(I will have occasion later to refer to this paragraph and will do so as “para. A”). Having referred to the correspondence and to submissions on the question of illegality the trial judge concluded his judgment as follows:

“Since I have construed the instrument of November 12, 1955, to create a trust the action fails and there will be judgment for the defendant. I will hear argument as to costs.”

I think this last passage must be read as conveying the trial judge’s interpretation of what he had held in para. A, as there appears to be nothing else to which it could appropriately refer.

The plaintiffs having failed in their claim for a declaration, brought the present appeal; I will refer to them hereafter as “the appellants” and to the defendants as “the respondents”. Mr. Gratiaen, who led for the appellants, expressed the view that the trial judge should not on the pleadings have framed an issue introducing the question of a trust. That however was not argued as a ground for upsetting the judgment, for counsel conceded that in the light of the agreement between counsel, if the issues introducing the question of a trust were to be confined to a pure question of law arising from the construction of the transfer and the agreement he could not fairly complain of prejudice or embarrassment. Mr. Gratiaen’s main argument was as follows:

“I complain as a matter of fundamental importance of the attempt made from time to time to argue, not merely that these two documents created the trust, but that independently of them a resulting trust arose by implication of law from certain circumstances, and that in those circumstances the agreement of November 12, 1955, if it did not create a trust was not inconsistent with the continued existence of a resulting trust. That was an alternative question outside the agreement which should never have been considered by the judge because it necessarily called for a clear statement in the pleadings of the facts relied upon to establish a resulting trust independently of the trust allegedly created by the agreement.”

I trust that this submission has been transcribed correctly, for though it can be rested upon ground 17 of the memorandum of appeal, it does not follow it in phraseology. Mr. Gratiaen submitted that the learned judge misconstrued the agreement and he asked this court to decide that it did not create a trust, and that pursuant to the agreement between counsel the appellants were entitled to a declaration. He submitted that in view of counsel’s agreement and in the absence of appropriate pleadings it was not open to the respondents to rely on any other trust, and that the learned judge was wrong in holding that there was a resulting trust. He said that in the paragraph from the judgment which

I have set out above as para. A, the learned judge found that because certain matters were known to Galanos there was a resulting trust preceding and not excluded by the agreement; that once one specific issue had been agreed upon it was wrong to take the view that even if the agreement did not create a trust certain other facts not pleaded gave rise to an independent trust. The court was tied by the agreement between counsel.

I agree that, in the circumstances, what the court had to do was to decide the single issue upon which counsel had agreed that the success or failure of the action depended. It was an issue for which the pleadings, in my opinion, provided only a dubious base; at least it was not defined in the pleadings with clarity as such an issue ought to be defined. Nevertheless it was an agreement between experienced counsel who had all the facts before them, and an agreement from which, on the appeal, neither side has sought to resile. With all respect to Mr. Gratiaen's argument, however, I am unable to accept, after careful examination of the whole record, that the issue agreed upon was as narrow as he has suggested. Mrs. Kean, when informing the court of the agreement after the luncheon adjournment on November 26, 1959, referred to "the agreement of 12.11.55 taken with the transfer", and although the learned judge later mentioned the agreement only, I have no doubt at all that the court was intended to consider and did consider the effect of both documents. The transfer was referred to in the agreement and both documents were obviously essential parts of whatever arrangement the parties wished to arrive at. What Mr. Gratiaen's submission amounts to is that unless the agreement was itself to be construed as creative of a trust, either express or to be implied from the language employed, by way of settlement or declaration by Galanos as a full beneficial owner, the declaration asked for in the plaint must be made. That, to my mind, is too narrow and artificial, and I am satisfied that what counsel had in mind was the question whether the arrangements effected by the transfer and agreement in November, 1955, resulted in a relationship of trustee and beneficiaries between Galanos and the appellants or in some other relationship such as debtor and creditor. That is in accord with Mrs. Kean's own explanatory words to the court, "i.e. whether Galanos deceased was a trustee of the estate."

Mr. Gratiaen's alternative argument was that the learned judge was wrong in finding that a resulting trust arose in the present case. He submitted that if Hurley had transferred the property without the consent of the appellants they could have followed it, but where, as here, the beneficiaries themselves arranged the transaction, they could not claim the property as against the transferee. That proposition ignores the fact that the consideration set out in the transfer was never paid or intended to be paid. Nor do I construe the agreement as imposing upon Galanos any obligation of such a nature that it could be said to provide consideration for the transfer in lieu of the sum mentioned in that document, or which was inconsistent with the position of a trustee. Had the appellants directed Hurley to transfer the estate for value he would of course have remained a trustee for the consideration received and the transferee would have taken the estate. But where beneficiaries direct a transfer for no consideration I see no reason why the ordinary rules should not apply; the transferee would hold as trustee for the beneficiaries, though he could adduce parole evidence to show that the intention was that he was to take beneficially: see *Lewin on Trusts* (15th Edn.) p. 130.

My own view of the task which was before the court is this. As I have said, if the transfer, established to be a voluntary one, stood alone, there would be a trust in favour of the appellants unless otherwise rebutted. The transfer does not stand alone but must be read together with the agreement which followed it. It was within the competence of the appellants and Galanos to arrive at any legal position which they desired; it was a question of what they intended and their intention must be arrived at by construing the transfer and the agreement

together. In the approach to such a task, however, I think it is a relevant consideration that the effect of a voluntary transfer standing alone would have been as I have stated.

On the question of the agreement Mr. Gratiaen submitted that the correct approach was that if a document is capable of being construed as creating legally enforceable rights that interpretation was to be preferred to one which, though possible, would give rise to an illegal and unenforceable arrangement. He relied upon *Mills v. Dunham* (2), [1891] 1 Ch. 576, and *Rodger v. The Comptoir d'Escompte de Paris* (3) (1869), L.R. 2 P.C. 393. He submitted that the agreement had no marks of creating a trust between parties; that it was consistent with an agreement reached between a new owner and former beneficial owner. He suggested that the object of the words "any sums which shall be due" in cl. 1 of the agreement was to cover any loans which might be made after the date of the agreement, not to cover management expenses; no question of management expenses would be anticipated as the land was leased at the date of the agreement. He pointed out that there was no undertaking by Galanos to do anything inconsistent with full ownership. Though there was an obligation upon Galanos' executors under cl. 3 not to sell without the agreement of the appellants as to the price, there was no such restriction upon Galanos personally. He submitted that though the agreement cast no specific obligation upon Galanos to sell, there was an implied term that he would do so in a reasonable time. An instrument intended to create a trust would, he submitted, have contained provision for disposal of rents and profits.

The matter of possible illegality, which Mr. Gratiaen relied upon as an aid to the construction of the agreement is rather obscure. If Galanos acquired the estate on behalf of the appellants without the consent of the Land Control Board in writing, that would be contrary to s. 7 (b) of the Land Control Ordinance (Cap. 150 the Laws of Kenya). The consent of that board is in fact endorsed on the transfer to Galanos, as is that of the Commissioner of Lands under s. 88 of the Crown Lands Ordinance (Cap. 155). There is no evidence as to what was disclosed to these authorities when the consents were given; the matter was only raised in argument at the end of the case in the court below. In the absence of anything to show the contrary, Hurley's trusteeship must be presumed to have been in accordance with and not contrary to law. There is no evidence to show that it would have been impossible to obtain official sanction for Galanos to continue that trust. If that had been established it would have provided stronger support for Mr. Gratiaen's argument that the transfer and agreement, which were drawn by an advocate, were designed to accomplish ends similar to those of a trust but by the different and legal means of vesting the legal and beneficial interest in Galanos and creating a new debtor and creditor relationship. That position, however, was not established. On the other hand Mr. O'Donovan pointed out that even if a trust was contrary to the provisions of the relevant Ordinances, it was an illegality upon which Galanos could not have relied without fraud, and therefore could not have relied on at all; this factor may have been present to the mind of the draftsman. I think this question is too speculative to provide any assistance. What does, to my mind, weigh heavily against the debtor-creditor argument is the fact that no provision was made in the agreement for the appellants to receive any portion of the rents or profits or of any compensatory interest pending sale. As beneficiaries under a trust they were protected as to the rents and profits.

I turn now to a question of evidence. Certain grounds of appeal in the memorandum complain of the admission by the learned judge of extrinsic evidence, to explain the agreement. I did not understand Mr. Gratiaen to press this matter strongly, though he contested the correctness of the learned judge's ruling that there was a latent ambiguity in the words "any sums which shall be due" in the agreement. His objection to the evidence in the main was related to

his principal contention that the learned judge had found some form of trust not within the agreement made between counsel; he said that it was not open to the learned judge to find that the correspondence showed some kind of trust prior to the agreement. With respect I do not think that the learned judge did that. I think that the passage from his judgment which I have already quoted as para. A, shows that he formed his opinion primarily from the circumstances surrounding the execution of the two documents. He then drew, it is true, confirmation for his view from the subsequent attitude of the appellants as disclosed in the correspondence but I do not think that he can be said to have based his opinion on that.

I have no doubt that evidence of surrounding circumstances was admissible in this case to enable the court to ascertain and give full effect to the intention of the parties when they executed the transfer and the agreement. The latent ambiguity lies in the question of the capacities in which the parties were dealing with each other and the main circumstances are in fact referred to in the recitals of the agreement which show the original beneficial interest of the appellants in the estate, the reason for Galanos' taking it over, and the fact that he did not pay the consideration mentioned in the transfer. The agreement itself is one of the circumstances upon which the appellants must rely to rebut the presumption of a trust in Galanos arising from the transfer of the estate to him without consideration. Galanos' own evidence would have been admissible for the purpose: as was said by James, L.J., in *Fowkes v. Pascoe* (4) (1875), L.R. 10 Ch. App. 343 at 349:

“Where the Court of Chancery is asked, on an equitable assumption or presumption, to take away from a man that which by the common law of the land he is entitled to, he surely has a right to say: ‘Listen to my story as to how I came to have it, and judge that story with reference to all the surrounding facts and circumstances’.”

It must follow, I think, that either party is entitled to insist that all of the surrounding circumstances are placed before the court. On the other hand I am doubtful whether any sound basis has been shown for relying upon the subsequent correspondence as a guide to the construction of the two documents in question. Where there is ambiguity, the sense in which both parties have acted upon the document is admissible in explanation: Monir's Law of Evidence (3rd Edn.) p. 682, relying upon English authorities. In my opinion it is difficult to spell out of the correspondence, which is mainly between advocates, any such mutual course of conduct, and to any extent that it tended to show the way in which the appellants' advocate construed the documents it was irrelevant. The learned judge mentioned a statement in a letter from the advocate for the appellants in which he said that his clients were indebted to the deceased for the running expenses of the estate since November 12, 1957. If made by a deceased person that statement might have been admitted as a statement against interest under s. 32 (3) of the Indian Evidence Act (and see the judgment of Wickens, V.C., in *Stock v. McAvoy* (5) (1872), L.R. 15 Eq. 55 at 58). In the circumstances of this case I see little more in the statement than the expression of the advocate's opinion of the legal position, which I do not think was relevant to the question of construction.

On this matter of evidence, for the reasons I have given, I consider that the learned judge correctly considered all surrounding circumstances but ought not to have attached any weight to the correspondence. As I have already said, however, as I read the judgment the learned judge only referred to the latter to show that it confirmed the view which he had already expressed, to the effect that Galanos was a trustee. This court was not invited to consider ordering a new trial on any ground relating to wrongful admission of evidence; I would in any event have taken the view that any evidence which was wrongly admitted

caused no substantial wrong or miscarriage of justice and that under r. 76 (2) of the Eastern African Court of Appeal Rules, 1954, an application for such an order would have had to be refused.

On the question of the construction of the transfer and the agreement, I am of opinion that the learned judge in effect arrived at the correct result, which is, I consider, that the effect of the two documents was to constitute Galanos a trustee. The transfer without consideration inevitably clothed him with that role unless a contrary intent could be drawn from the agreement and the surrounding circumstances. I do not think it is material whether the position is regarded as a resulting trust stemming from the transfer, or whether that document should be contemplated as vesting property subject to an existing trust in a new trustee. Either possible view could have been negatived if the agreement and the surrounding circumstances had shown that the intention was that Galanos should take beneficially. I agree with the learned judge that they do not. I have already dealt with the argument based upon the possible illegality of a trust and found it indeterminate. The estate was at the material time leased to Zagoritis at £3,000 per annum, and, as the learned judge pointed out the estate was the appellants' only asset. Could the intention have been to surrender these rentals to the wealthy Galanos, which would have been the result of the debtor-creditor relationship contended for? If such a relationship were intended, also, there appears to be no reason why provisions should not have been inserted limiting Galanos' right to commit waste pending sale and imposing some form of obligation to use his best endeavours to sell and some restriction as to price. With Galanos as a trustee the appellants were protected in respect of all of these matters. I do not consider that the fact that Galanos was entitled, under the agreement, to deduct from the purchase money sums due to himself or Tongoni Plantations Ltd., is incompatible with a trust; nor is there anything in the agreement to prevent interest running on the existing loan if interest was payable under whatever arrangement was in force in relation to that loan. The fact that Galanos was not called upon by the agreement to consult the appellants as to the minimum sale price, whereas his executors were so obliged, merely points to the fact that the appellants, no doubt by reason of their relationship to him, had confidence in Galanos personally. As a trustee he would have to obtain the best price in any event. The restriction on the right of sale by Galanos' executors I think to be equally consistent with either a trust or a debtor-creditor arrangement. I do not find anything in the agreement which points to an intention to alter, with relation to the land, the position which the parties would have occupied if the agreement had not been entered into. It may be asked, if that is the case, why the agreement was in fact signed. No firm answer can be given, beyond the facts that on the one hand, it contradicted the statement in the transfer that the purchase price had been paid in full and put on record certain obligations to be performed by Galanos, and on the other, that it contained acknowledgment of the debt to Galanos or Tongoni Plantations Ltd., and gave Galanos a secure way of obtaining payment of that indebtedness.

For the reasons I have given I am of opinion that the declaration asked for was rightly refused by the learned judge. I would therefore dismiss the appeal with costs and certify for two counsel. In the Supreme Court the order for costs, following *Re Grimthorpe's Will Trusts* (6), [1958] 1 All E.R. 765, was that the defendants were entitled to be paid out of the proceeds of sale of Cranhurst Estate all costs and expenses properly incurred. I would make the order as to the costs of the appeal in the same terms: as, however, no argument on the question of costs was addressed to this court, I would also give leave to either party to apply to a judge of this court for a variation of that order if they so desire.

Sir Kenneth O'Connor P: I have read the judgment of Gould, J.A., and agree with it.

The following facts were not in dispute.

The appellants are members of the Ayoub family. The second appellant was formerly the wife of one Christos Galanos who died in 1957. The third appellant is the wife of one Hurley. The defendants are the executors of the will of Christos Galanos.

Cranhurst Estate (hereinafter referred to as “the estate”) is an estate of 320 acres held on a Crown lease for ninety-nine years from 1905. It is situated in the Highlands of Kenya and is subject to the Land Control Ordinance (Cap. 150 of the Laws of Kenya) as well as to the Crown Lands Ordinance (Cap. 155). It is a valuable estate.

The estate was bought with money belonging to the Ayoub family and transferred to and registered in the name of Hurley, the husband (as has been mentioned) of one of the Ayoub daughters. Thereupon, since the property was conveyed to a person other than the real purchasers (no presumption of advancement being applicable), a resulting trust arose in favour of the purchasers. It is, indeed, common ground that Hurley held the estate as a trustee for the Ayoub family. As Mr. Gratiaen, for the appellants, stated in opening the appeal, Hurley held the legal estate and the beneficial interest was in the Ayoub family. Under s. 7 (1) and s. 46 of the Land Control Ordinance, it is an offence, involving serious consequences, for any person to acquire any right, title or interest in or over any land for or on behalf of any person without the consent in writing of the Land Control Board. There is no evidence whether the Land Control Board was informed that Hurley held the estate as a trustee for the Ayoub family.

In 1954 Hurley leased the estate to one Zagoritis. Zagoritis failed to pay an instalment of rent which fell due on October 31, 1954.

On November 11, 1955, Hurley executed a transfer of the estate to Galanos expressed to be in consideration of Shs. 300,000/- paid by Galanos, the receipt of which was acknowledged by Hurley. Galanos, was a wealthy man, and (as already mentioned) the husband of the second appellant. On the following day, November 12, 1955, an agreement (hereinafter referred to as “the agreement”) was entered into between Galanos and the Ayoub family.

The agreement recited that the estate had been purchased by the Ayoub family and registered in the name of Hurley. The agreement then recited that the Land Control Board had refused to allow the Ayoub family to have the farm registered in their names and that Galanos had agreed to take it over and have it registered in his name. It was stated that at that date a sum of approximately £11,000 was due to Galanos. It was further recited that although a transfer of the estate from Hurley to Galanos was being registered, the total purchase money was not being paid as Galanos thereby admitted, notwithstanding that a full receipt had been given in the formal transfer of the estate from Hurley to Galanos. The Ayoub family and each of them then declared that they were entitled to one quarter each of the benefit of any sums which might become payable under the agreement and it was agreed and declared that Galanos should pay to the Ayoub family a sum which should represent the difference between the sale price of the estate and “any sums which shall be due” either to Galanos personally or to Tongoni Plantations Ltd., such sum to be paid within seven days of the completion of a sale. By cl. 2 the Ayoub family agreed, pending a sale, to take no action to “recover the sum due under this agreement”. In the event of the death of Galanos before the sale of the estate, Galanos thereby directed that his executors should not sell the estate unless the price was agreed by the Ayoub family and each of them and should thereafter account to the Ayoub family in accordance with the terms therein before stated.

The recitals in the agreement are admitted to state the facts correctly. I understood it to be common

ground also that the words “the total purchase money is not being paid” meant that none of the purchase money was being

paid; and that none of it was in fact paid. The consideration mentioned in the transfer was, therefore, fictitious. There was, of course, consideration for the transfer in that Galanos agreed to take over the estate and have it registered in his name (the Ayoub family being unacceptable as registered owners of this land in the Highlands) and in that Galanos was put in a position to sell the estate and recover out of the proceeds any sums which should be due to him or to Tongoni Plantations Ltd. (there being already £11,000 due) the balance being payable to the Ayoub family. But that was not the consideration mentioned in the transfer.

It is difficult to understand why a fictitious sum (upon which presumably stamp duty would be calculated) should have been inserted in the transfer unless it was to lend verisimilitude to the transaction for the benefit of the Land Control Board. Upon the registered title taken alone Galanos was apparently the absolute owner of the estate to the complete exclusion of the Ayoub family. There was nothing on the title to show that Hurley had been a trustee having only the legal estate. It was, therefore, necessary for the Ayoub family to be in a position to prove that, in fact, they were the beneficial owners which, at that stage, they undoubtedly were. Hence the agreement, which recited the true position and contained an admission by Galanos that the purchase money mentioned in the transfer was not being paid and an undertaking by Galanos to pay to the Ayoub family the balance of the purchase price on a sale of the estate less whatever might be due to him or Tongoni Plantations Ltd. No period was fixed by the agreement within which the estate was to be sold and nothing was said as to the expenses or the allocation of the rents and profits in the meantime. If any express provision had been made for payment of profits less expenses to the Ayoub family, that would have disclosed a trust. It is difficult to appreciate the reason for cl. 2 of the agreement since on the face of the agreement “the sum due under this agreement” would not be due in any event until seven days after the completion of a sale.

On January 18, 1956, Galanos as proprietor of the leasehold title re-entered on the estate evicting Zagoritis without due process of law, claiming a right to do so on two grounds: first that Zagoritis had defaulted in payment of an instalment of rent due during Hurley’s proprietorship; and, secondly, that Zagoritis had failed to maintain the estate.

In January, 1956, Zagoritis sued Galanos in Civil Case No. 99 of 1956, for wrongful re-entry, claiming, among other claims, over Shs. 800,000/- as damages.

On May 5, 1957, Galanos sold the estate to one Horn for £35,000 payable as to £5,000 down and the balance by annual instalments of £5,000 per annum.

On June 29, 1957, Galanos died. After his death the respondents were substituted as defendants and, on August 15, 1958, they compromised Zagoritis’ claim by paying him Shs. 133,000/- and costs, making a total of Shs. 149,000/- odd.

The respondents, as executors of Galanos, claimed to be entitled to recoup themselves this expenditure by deducting it from sums payable to the appellants under the agreement as proceeds of the sale of the estate to Horn. The appellants denied the respondents’ right to this recoupment. On August 11, 1959, the appellants filed a plaint in which they claimed a declaration that the respondents were not entitled to deduct from the proceeds of the sale of the estate the money paid to Zagoritis to settle his claim (hereinafter called “the Zagoritis settlement money”). In para. 3 of their original plaint the plaintiffs pleaded the agreement and pleaded that it had thereby been agreed, *inter alia*, that Galanos should pay the sums mentioned to each of the appellants “who were beneficially entitled to the estate to the extent of one quarter each”. This was amended during the hearing to read “who had been beneficially

entitled to the estate” meaning during the trusteeship of Hurley and before the transfer to Galanos.

By para. 2 of the defence, the respondents admitted the agreement, and said that they would refer at the trial to the agreement for its meaning and effect.

The respondents maintained that the appellants were bound by the settlement with Zagoritis and pleaded that the settlement was for the benefit of the appellants and that the appellants had agreed to be liable for any payments incidental to Zagoritis' suit including costs, and they pleaded that the appellants were estopped by their conduct from denying their interest in the Zagoritis settlement. They denied that the appellants were entitled to the declaration prayed.

The case came on for trial on these pleadings. Counsel for the respondents made a preliminary objection that the plaint disclosed no cause of action. He submitted, *inter alia*, that the implication of para. 3 of the plaint was that Galanos was a trustee of the estate and that he would be entitled to indemnity in respect of the Zagoritis settlement money as paid out on behalf of the beneficial owners of the estate (the appellants) unless he had acted unreasonably or in breach of trust in making the payment. Counsel for the appellants submitted, *inter alia*, that their case was that Galanos agreed to pay them the sale price of the estate and that the estate had been sold: the respondents claimed to be entitled to deduct certain moneys: it was for them to prove that they were entitled to do so. The learned judge overruled the preliminary objection.

Counsel for the respondents then announced that the defences of estoppel and agreement by the appellants to the Zagoritis settlement were not being proceeded with: the appellants' case would be that there was a resulting trust.

The court then framed issues:

- “(1) Whether the defendants are trustees and entitled in that capacity to deduct the sums involved in the settlement of Court Case No. 99 of 1956.
- “(2) If not whether they are entitled to deduct the said sums under the agreement of November 12, 1955.”

The first two grounds of appeal allege that the learned judge erred in framing the first issue, as this was not raised on the pleadings, or alternatively in framing it without the defence being properly amended and an adjournment granted to the appellants. I think that it would have been better if the pleadings had been amended; but it was the duty of the court to frame issues upon the points of fact or law upon which the parties were at variance (O. XIV, r. 1 (5), of the Kenya Civil Procedure Revised Rules, 1948); and under r. 3 of that Order the material on which issues can be framed includes allegations made by the advocates of the parties. The agreement had been pleaded in the plaint and the meaning and effect of it had been put in issue by the defence and it was quite clear from the argument which had already taken place that a material proposition of law on which the decision of the case might well depend was whether or not the circumstances disclosed by the agreement constituted Galanos a trustee for the appellants. I think that the judge was entitled to frame the issues as he did. In fact, an adjournment was granted shortly afterwards. I think that ground 1 and ground 2 of the memorandum of appeal fail.

To return to the course of the proceedings in the Supreme Court: Learned counsel for the appellants, having started to open her case, said that she had not come prepared to argue the case on the basis of trustee and asked for an adjournment. The hearing was adjourned to the following day.

On the following day the evidence of a witness who had to return to Tanganyika was interposed.

The following is the record on what then took place between counsel as recorded in the learned judge's notes:

“O'Donovan: Either Galanos is beneficial owner who can do what he likes or he is trustee. Issue is very narrow.

“Kean: If it is conceded that if no trust, I must concede there is little

between us.

“O’Donovan: If he is liable to account for profits he is entitled to be indemnified. He must be trustee. In construing phrase ‘which shall be due’ court may look at evidence.

“Adjourned to 2.15 p.m.

“2.15 p.m.

“Mrs. Kean: Now agreed that only point for decision is whether the agreement of 12.11.55 taken with the transfer constitutes a trust, i.e. whether Galanos deceased was a trustee of the estate. If he did hold as trustee it is agreed that the plaintiffs are not entitled to the declaration. If he did not hold as trustee it is agreed that plaintiffs are entitled to the declaration.”

A legal argument followed as to the admissibility of evidence of surrounding circumstances to assist in the construction of the agreement. It was argued for the respondents that there was a latent ambiguity in the words “any sums which shall be due” to Galanos which occur in cl. 1 of the agreement. This phrase could cover expenses of management of the estate incurred by Galanos as well as the debt owing to him as recited in the agreement: if they enabled Galanos to charge management expenses against the sale price of the estate, this would show that he was in the position of a trustee. It was argued contra that the words were unambiguous. The learned judge ruled that there was a latent ambiguity in the words “any sums which shall be due” and admitted evidence of surrounding circumstances. This decision was attacked on appeal. Mr. Gratiaen, for the appellants argued, among other things, that the estate was then leased to a tenant in possession so that the words could not possibly refer to management expenses incurred by Galanos. But, only about two months after the execution of the agreement, Galanos evicted the tenant and he may well have had the intention to do this when the agreement was executed. I think that evidence of the surrounding circumstances was admissible under the sixth proviso to s. 92 of the Indian Evidence Act, and see *Cannon v. Villars* (7) (1878), 8 Ch. D. 415, 419; *Hart v. Hart* (8) (1881), 18 Ch. D. 670.

The appellants called a witness and closed their case. Counsel for the respondents addressed the court and the case was adjourned till the following day. At that late stage counsel for the appellants applied to amend para. 3 of the plaint by substituting “had been” for “were” beneficially entitled, and the amendment was allowed. Counsel for the appellant then said:

“I apply for the issues to be changed and defence properly amended. The case for the plaintiffs was never that the relationship of trusteeship existed. Defence was agreement and estoppel. Basis of trial completely changed. I may have injured my case. If the defence had been that they were entitled as trustees to make the deductions they would have to show they acted reasonably. Order VI, r. 2. Court still has power under O. XIV, r. 5 (1), to amend issues. I ask issues to be struck out and for pleadings to be amended.”

Learned counsel for the respondents replied that counsel for the appellants and he had reached agreement the day before that if the defendants were trustees, the action failed and that if they were not, the action succeeded. That agreement was not unfair and he did not release his friend from it: it was an agreement with certain automatic consequences. The learned judge after hearing further argument, ruled as follows:

“... on the pleadings the issue as to the construction of the agreement of 12.11.55 is clearly raised. The only issue which arises in this case is whether the agreement creates the relationship of trustee and cestui que

trust. I see no necessity for amending the issues.”

That ruling was challenged on appeal. I think that the issues as framed sufficiently covered the question of trust or no trust. It would have been better, as I have said, to have amended the pleadings at an earlier stage; but I do not think that the failure to do this was fatal.

The learned judge found that Hurley had been a trustee, that Galanos had acquired the estate from him without payment and with knowledge of the outstanding equities and was also a trustee. He held that if the agreement created a trust, the transaction was illegal; but that it was not necessary for him to decide the case on that ground, since it was conceded that if the instrument did amount to a trust, the plaintiffs were not entitled to the declaration claimed and that the action failed.

The main argument addressed to us on the appeal concerned the agreement which had been made between counsel.

The effect of the agreement between counsel was, as it seems to me, on the one hand, to make it unnecessary for the court to consider whether the transaction by the plaintiffs which was evidenced by the transfer and the agreement was illegal; and, on the other hand, to make it unnecessary for the court to consider the propriety of Galanos’ action in re-entering upon the estate which he had leased to Zagoritis and the propriety of the settlement made by the executors of the suit launched by Zagoritis as a result of that re-entry.

Counsel were both experienced counsel and to make such an agreement was within their ostensible authority. The agreement was reached after an adjournment. In the circumstances of this case, I see no reason to doubt that, in coming to their agreement, counsel were acting prudently and in the best interests of their respective clients.

Mr. Gratiaen, in his argument before us, said that if the issues introducing the question of trust were to be confined to a pure question of law on the construction of two documents, he could not fairly complain. But he did complain of the finding of the learned judge that, independently of the transfer and the agreement, there was a resulting trust arising by implication of law from certain circumstances and that the agreement, even if it did not create a trust, was not inconsistent with the existence of one. The passage in the judgment is:

“The position seems to me to be this. It is clear from recital (1) in the agreement that Hurley was in fact a trustee. Galanos purchased from a person whom he knows to be a trustee. He acquired the estate without payment and with knowledge of the outstanding equities. Even if there were a payment Galanos had knowledge of the outstanding equities. There is nothing in the agreement to exclude a resulting trust and the arrangement was connected with such a trust.”

Mr. Gratiaen said that that was an independent question outside the agreement between counsel which should not have been considered, as it necessarily called for a clear statement in the pleadings of the facts which caused a resulting trust independently of the trust created by the agreement.

I cannot agree. In the passage referred to the learned judge was not relying on extraneous facts, but on the facts disclosed in the agreement which had been pleaded and produced by the plaintiffs, and which facts were not denied. I think that the distinction sought to be drawn between a trust created by, and a trust constituted from the facts disclosed in, the agreement is too narrow and I feel confident that no such distinction was in the minds of counsel when they made their agreement. The argument of counsel for the defendants on the preliminary point had been that there was a resulting trust arising from the facts recited in the agreement and the plaintiffs’ beneficial ownership of the estate as pleaded in para. 3 of the plaint.

Moreover, counsel for the plaintiffs had explained the only point then left at issue in the terms quoted above which, in

my opinion, do not fairly bear the narrow construction put upon them by Mr. Gratiaen.

I understood Mr. Gratiaen to argue in the alternative and without prejudice to his contention that there was no resulting trust, that even if Hurley was a trustee, the following would be the position. If Hurley conveyed the property to Galanos absolutely and Galanos had knowledge of the equities, Hurley's beneficiaries could follow the trust property; but where the beneficiaries were consenting persons and arranged the transaction, they could not say that they had a right to claim the property as against the transferee. That seems to me to beg the question. It depends on what the arrangement was which the beneficiaries made or to which they consented. That, we know, was an arrangement by which, since they, the Ayoub family, could not be registered as owners of the estate, Galanos took from their trustee a transfer to himself, expressed to be for a consideration which was not in fact paid, and agreed that when he sold the estate, he would pay the proceeds to the Ayoub family after deducting the sums due to himself and Tongoni Plantations Ltd. Was Galanos to be the absolute owner pending a sale at some undetermined future time or was he to hold the estate in the meantime for the benefit of the Ayoub family? Whether the Ayoub family could claim the property as beneficiaries and were subject to the liabilities of beneficiaries depended on the answer to that question. The learned judge found that the balance of probabilities was strongly in favour of the latter supposition and I agree. If that was the arrangement to which the Ayoub family consented, there was nothing (apart from the question of illegality under the Land Control Ordinance) to prevent them exercising their rights as beneficiaries against their new trustee. Per contra, they would be liable to indemnify him against expenditure properly incurred in connection with the trust.

Mr. Gratiaen argued that a legal interpretation of the transaction was to be preferred, if this could be done without violence to the language used. As a general proposition I agree. The case for such an interpretation in this instance would have been very much strengthened if the consideration expressed in the transfer had not been untruly stated. It would have been further strengthened if it had been proved that the true position, as disclosed in the recitals to the agreement, had been disclosed to the Land Control Board when their consent to the transfer was obtained. In my opinion, the language of the first three recitals to the agreement discloses the existence of a trust by implication of law and there is nothing in the operative part of the agreement which is inconsistent with the position of Galanos as a trustee. Hurley had only a legal estate and could convey nothing but a legal estate to a transferee who had notice of the equities, as Galanos had, unless the beneficiaries—the Ayoub family—authorised and directed him to convey their beneficial interest also, so as to make Galanos an absolute owner. Did they do so? That was a question of fact. Hurley transferred the estate as registered proprietor. But he was admittedly a trustee. The wording of the transfer would have been the same whether or not he held the beneficial interest. It was quite inconclusive to show that the beneficial interest passed. There is nothing in the agreement which states that Galanos is to have the estate beneficially. Indeed, the first two recitals, reciting as they do that the estate had been purchased by the Ayoub family and registered in Hurley's name and that Galanos had agreed "to take over the farm and have the same registered in his name" are far more apt to describe a transaction by which Galanos is to step into Hurley's shoes as a trustee, than to describe a sale or transfer to Galanos absolutely. There is not a word to say or imply that the transfer was more than a transfer of Hurley's legal estate to Galanos. If the Ayoub family intended their beneficial interest to pass and authorised Hurley to convey it, then that fact, since the documents do not establish it, would have to be established by admissible evidence dehors the documents. The second appellant, the widow of Galanos, was called to state

what the arrangement was. I doubt whether her evidence was admissible. If it was, it certainly did not establish that the estate was intended to be made over to Galanos absolutely. She said, among other things, that she knew it was wrong for Galanos to hold the estate as trustee; but in cross-examination she said:

“My husband was a multi-millionaire. The Ayoub family had the farm—that is all. We did not intend to make a gift to my millionaire husband at all. We owed him a certain sum. It was as if he had paid us money. Certainly we did not intend to give my husband the use of the estate as long as he liked to keep it. The estate was the property of the Ayoub family. It was registered in the name of my brother-in-law. I don’t know why we wanted to get rid of Mr. Hurley. I don’t know where he is now. I don’t know if he is still my brother-in-law. My sister and brother-in-law are in England. Mr. Hurley was not a trustee. He was proprietor. It was our estate but he was proprietor. When Galanos took over the estate it was his. We made a business arrangement. We trusted my husband as a business man to sell the estate for us. We trusted him to manage it properly. He knew about these things. It was his. He did what he wanted. We owed him money. I am not being. The arrangement with my mother was not written, it was verbal.”

There was evidence, which I think was admissible as an admission by a party and possibly also as evidence of a course of conduct, of a meeting on July 23, 1957, at the Standard Bank, Nairobi, between Mrs. Ayoub and Mr. Henry Ayoub and the trust officer of the bank and a Mr. Holder, an executor of the estate of Christos Galanos, deceased. Mr. Holder took notes and prepared minutes which he produced. He testified that they accurately reflected what took place at the meeting. Mr. Holder is an advocate of the Supreme Court of Kenya and of the Tanganyika High Court and there is no reason to doubt that statement. The minutes show that the agreement was before the meeting and that, in response to a question put to Mrs. Ayoub and Mr. Henry Ayoub (the fourth appellant) the latter put forward a claim by the Ayoub family not only to the proceeds of sale of the estate, but to the proceeds of the 1956 coffee crop. Mr. Ayoub admitted that there would be owing to Galanos not only the sum of £11,000 (presumably the £11,000 mentioned in the agreement) but also the expenses incurred by Galanos in connection with the running of the estate. Mr. Ayoub “admitted that such expenses would be a debt due by the Ayoub family to Mr. Galanos”. If this evidence was correct, it was decisive against the thesis that Galanos was the absolute owner of the estate and that the Ayoub family had intended to convey their beneficial interest to him absolutely. They were claiming as of right the profits of the estate subsequent to the agreement and admitting liability for running expenses. This is quite incompatible with an absolute sale of the estate to Galanos, and incompatible with the theory that the trust merely attached to the proceeds when the estate came to be sold by Galanos. These minutes were not agreed by the Ayoub family; but the point of disagreement apparently was the part of the minutes dealing with the Zagoritis settlement and not the part referred to above. In any event there is no reason to doubt Mr. Holder’s evidence.

The learned judge admitted evidence of the course of dealing between the parties and certain letters from their advocates as illustrating how the agreement had been interpreted.

As already stated, I think that evidence of the circumstances surrounding the execution of the agreement was admissible under proviso (6) to s. 92 of the Indian Evidence Act. Whether evidence of the course of dealing (which must be a course of dealing by both parties) was admissible or not would depend on whether the meaning of the document was doubtful. *Monir on Evidence*

(3rd Edn.) p. 682; *N.E. Railway Co. v. Hastings (Lord)* (9), [1900] A.C. 260. I incline to the view that the evidence of a course of dealing by both parties was admissible. I find it unnecessary, however, to decide whether such evidence was admissible or not and would merely say that, in my opinion, the recitals in the agreement whose correctness was not challenged disclosed that Galanos was in the position of a trustee. If the other evidence was admissible it did not displace, but strongly reinforced, that conclusion.

To sum up: Galanos, with knowledge of the equities took a transfer from a trustee, the effect of which was to give him the legal estate in the property transferred, and it was not shown that he ever obtained the equitable estate, that is to say it was not shown that the legal and equitable estates were co-extensive and became united in the same individual. On the contrary, on the construction of the agreement Galanos was a trustee and this conclusion was strongly supported by the oral evidence, if admissible. The salient fact was that Galanos took the transfer from a trustee of an existing trust who had only a legal estate. Dicta taken from cases in which the transferor or settlor was the owner of the beneficial as well as the legal interest are not, in my opinion, of assistance.

In the absence of evidence of what facts were put to the Land Control Board, I feel dubious about the legality of the transaction effected by the transfer and the agreement. I am doubtful also as to the propriety of the re-entry by Galanos on the land leased to Zagoritis and consequently as to his right to indemnity in respect of that transaction. These matters, however, were removed from consideration of the court below by the agreement between counsel and were not argued either there or before this court. In the circumstances, I express no concluded opinion upon them.

I agree with the learned judge's conclusion that, on the case as it was conducted, the plaintiffs were not entitled to the declaration which they claimed.

There will be an order in the terms proposed by Gould, J.A.

Newbold JA: This appeal comes before this court in a confused and unsatisfactory condition. As Mr. Gratiaen, who appeared for the appellants, stated, the litigation started on the wrong foot and as it has developed it has gone right out of hand. I am doubtful whether on the pleadings as they stand the learned judge should, at an early stage in the case, have framed the issues which he did, which issues remained without change or addition until the end. When an issue of the relationship of trustee is framed by the court in circumstances in which the pleadings of neither party clearly allege such relationship and one party specifically denies this relationship there is a danger of the provisions of O. VI, r. 2, which require particulars of any alleged breach of trust to be pleaded, being overlooked until too late. I am also doubtful whether in all the circumstances of this case, including the pleadings, the issues, the arguments, the nature of the evidence and the way in which it was led, the learned judge should not, in spite of the agreement of counsel, have acceded to the request of counsel for the plaintiff made towards the end of the case and allowed the pleadings to be amended and the issues changed. There are many aspects of this appeal which lead me to the view that the most satisfactory course would be to have a retrial with amended pleadings, but neither party to this appeal has suggested such a course and this court is left to make the best of what, in my view, is an unsatisfactory position.

The facts of this case reduced to their simplest form are as follows: The appellants were the beneficial owners of Cranhurst Estate but the estate could not be registered in their names; they caused the estate to be transferred to and registered in the name of Mr. Galanos, who was the husband of one of the appellants and who was owed money by the appellants, on the understanding that

when Mr. Galanos sold the estate they would receive the excess of the sale price over the amount owed to him; while Mr. Galanos was the registered owner of the estate he took certain action which resulted in a suit against him; Mr. Galanos sold the estate and shortly thereafter died while the suit was still pending: Mr. Galanos' executors, who are the respondents, settled the suit on payment of a sum of money and costs and they claimed to be entitled to deduct the expenses of the settlement of the suit from the amount owed to the appellants as a result of the sale of the estate. To enable the executors to sustain their claim it is essential that Mr. Galanos should have been a trustee of the estate and the appellants the beneficial owners thereof.

As I have stated, I am doubtful whether the learned judge was correct in reducing the problems posed in this case in effect to the simple issue of whether or not Mr. Galanos held Cranhurst Estate as a trustee. However, the essential issue now before this court is whether the learned judge was correct in holding that Mr. Galanos was a trustee of the estate and the appellants the beneficial owners thereof. Should Mr. Galanos have been the trustee not of the estate but of the proceeds of the sale of the estate that would not, as this case has been presented, be sufficient to enable the executors to sustain their claim. Having regard to the view which I take of the essential issue I shall not deal with the other matters raised by Mr. Gratiaen, though I should say that the agreement of counsel does not appear to me to be restricted to a trust arising in a particular manner.

In order to determine the issue of whether Mr. Galanos held the estate as a trustee it is necessary to examine the circumstances at the time the estate was transferred to him, the documents executed at or about the time and the relevant statute law. There is remarkably little evidence on oath as to the circumstances at the time the estate was transferred to Mr. Galanos but it appears to be common ground that the appellants were the beneficial owners of the estate; that Mr. Hurley, in whose name the estate was registered, was the trustee of the estate and that the appellants desired, for some unspecified reason, that he should cease to be the registered owner; that the appellants were unable to register the estate in their names; that Mr. Galanos, a very wealthy man and the husband of one of the appellants, was owed about £11,000 by the appellants; that the estate was transferred by Mr. Hurley to Mr. Galanos for £15,000 (which amount was never intended to be paid) and the necessary consents to such transfer were endorsed on the deed; and that on the day following the transfer an agreement, drawn by an advocate, was entered into between the appellants and Mr. Galanos in relation to the estate.

Before examining the terms of this agreement it is necessary to bear in mind that under the Land Control Ordinance of Kenya it is unlawful for a person to acquire any interest over land coming within the ambit of the Ordinance without the consent of the Land Control Board. As a result of this it would have been unlawful for Mr. Galanos to hold the estate as trustee for the appellants unless the Land Control Board had given their consent thereto. There is no specific evidence as to whether this consent was ever applied for or obtained and the issue of illegality, though not pleaded, has been referred to delicately both in the judgment of the learned judge and in the submissions before the Supreme Court and this court. There is, however, evidence that the appellants, or at least one of them, were aware that they could not have an interest in the estate without such consent: at the end of the evidence of Mrs. Kyriazis she states that she knew it was wrong for Mr. Galanos to hold the estate as trustee and the agreement of November 12, 1955, recites that the Land Control Board had refused their consent to registration of the estate in the names of the appellants. I consider that the only possible inference from this evidence is that the consent to Mr. Galanos being a trustee of the estate was never given.

This, of course, does not decide the issue, as either Mr. Galanos was nevertheless a trustee of the estate in breach of the law, or the arrangement arrived at by the appellants and Mr. Galanos was such that it did not result in their having any interest in the estate, in other words that Mr. Galanos was not a trustee of the estate. I regard, however, this possibility of illegality as a fact to be borne in mind in determining the intention of the appellants and Mr. Galanos when the estate was transferred to him.

Turning now to the transfer of the estate and the agreement of November 12, 1955, there is nothing in either of these documents which expressly declares that Mr. Galanos is to be a trustee of the estate or that the appellants are to have any beneficial interest in the estate. If Mr. Galanos is to be a trustee and the appellants to have an interest in the estate a trust has to be implied. As long ago as 1672 it was said in *Cook v. Fountain* (10), 36 E.R. 984 at p. 987:

“so the trust, if there be any, must either be implied by the law, or presumed by the court. There is one good, general, and infallible rule that goes to both these kinds of trust; it is such a general rule as never deceives; a general rule to which there is no exception, and that is this; the law never implies, the court never presumes a trust, but in case of absolute necessity”.

In my view that statement of the law is as good today as it was nearly 300 years ago. Do the circumstances of this case require as of necessity that a trust should be implied? In my view they do not. The persons involved in this transaction were all related or connected; one of them was very wealthy and was owed a considerable sum of money by the others who were beneficially entitled to an estate; and it is clear there was an intention to sell the estate with the result that the debt could be discharged and any surplus given to the persons entitled to it. It is not an unwarranted assumption that the appellants considered the person most suitable to obtain a satisfactory sale would be Mr. Galanos, the wealthy husband of one of the beneficiaries, and that the simplest way of achieving this object would be to convey the estate to him absolutely while at the same time entering into an agreement setting out their various interests in the sale proceeds. This, on the facts, I consider a perfectly possible interpretation of the documents and one which would not result in a trust of the estate arising. While a different interpretation is possible, there is nothing in the circumstances which I regard as requiring as of necessity the existence of a trust.

The courts will not imply a trust save in order to give effect to the intention of the parties. As was said by Lindley, L.J., in *Standing v. Bowring* (11) (1886), 31 Ch. D.282, and at p.289:

“Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied.”

Further, the intention of the parties to create a trust must be clearly determined before a trust will be implied. Lord Halsbury, L.C., in *Smith v. Cooke* (12), [1891] A.C. 297, said at p. 299:

“I must say I for one have always protested against endeavouring to construe an instrument contrary to what the words of the instrument itself convey, by some sort of preconceived idea of what the parties would or might or perhaps ought to have intended when they began to frame their instrument. . . . I think I am not entitled to put into the instrument something which I do not find there, in order to satisfy an intention which is only reasonable if I presume what their intentions were. I must find out their intentions by the instrument they have executed; and if I cannot find a suggested intention by the terms of the instrument which they have executed I must assume that their intentions were only such as their deed discloses.”

In my view to imply a trust in the circumstances of this case might well defeat the intention of the parties to the agreement. I see nothing in the agreement nor in the circumstances of the transfer which compels me to say that the only intention of the parties concerned was to create a trust. It is true that the consideration mentioned in the transfer was never intended to be paid, but there nevertheless was very real consideration for the transfer. It is also true that if the appellants transferred the estate absolutely to Mr. Galanos they lost the right to any interim income from the estate pending the sale and they had no legal means of enforcing a sale save possibly from an implied term that the sale should take place in a reasonable time, but they obtained in effect a discharge of their current liability and, as Mrs. Kyriazis said in evidence, they relied on Mr. Galanos who was a member of the family and a business man who “knew about these things” to sell the estate to their greatest advantage. In fact he sold the estate in less than eighteen months and the circumstance that the sale price was £35,000 while the consideration mentioned in the transfer was £15,000 is as much evidence that he made an advantageous sale as that the figure of £15,000 was an under-valuation of the estate. The only direct evidence of the intention of the appellants at the time of the transfer is that given by Mrs. Kyriazis and is to the effect that no trust of the estate was intended. It is true that the learned judge, in deciding that a trust was created, would appear to have rejected this evidence, but as I understand the reasoning of the learned judge he appears to have come to this conclusion on a presumed intention of the appellants from the construction of the documents fortified by statements subsequently made by the advocates in correspondence. With respect to the learned judge, while I agree that a possible construction of the documents is an implied trust I do not think it the only or, in the circumstances, the more probable construction; and I consider the subsequent correspondence by the advocates a somewhat dubious base for implying a trust.

The basic facts of this case are not in essence dissimilar from the basic facts in *Central Trust and Safe Deposit Co. v. Snider* (13), [1916] 1 A.C. 266. In that case a niece conveyed to her uncle absolutely a half share in a property (the other half share already belonged to the uncle) for a nominal consideration. The real consideration, which was to take effect in future, was set out in a letter written on behalf of the uncle at about the time of the conveyance. The niece subsequently claimed that the conveyance, though absolute in form, was intended as a conveyance in trust for her. At p. 271 the Privy Council, which held that no trust arose, said

“The intention, as manifested by the conveyance, is clear enough. All the interest (of the niece), whether legal or equitable, is intended to pass. The letter contains nothing inconsistent with and a good deal to confirm this. (The uncle) was evidently intended to be put in a position to grant a lease or leases of the property on such terms as he might think desirable, which could not properly be done if (the niece) remained equitable owner of a moiety of the property”.

In my view the appellants in this case, having regard to all the circumstances, intended to transfer the estate absolutely to Mr. Galanos so that he had a free hand to deal with it in consideration of the discharge of their debt and the division of the expected surplus after a sale which, as members of a family, they relied on Mr. Galanos to make to their best advantage. This transaction in my view was never intended to be a trust and did not give rise to an implied trust. Accordingly I would allow the appeal.

Appeal dismissed.

For the appellants:

EFN Gratiaen QC (of the English Bar) and *Mrs L Kean*

For the respondents:

BO' Donovan QC and DF Shaylor

For the appellants:

Advocates: *Sirley & Kean*, Nairobi

For the respondents:

Buckley & Hollister & Co, Nairobi

Alwi Abdulrehman Saggaf v Abed Ali Algeredi
[1961] 1 EA 767 (CA)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	1 December 1961
Case Number:	73/1961
Before:	Sir Alastair Forbes V-P, Crawshaw and Newbold JJA
Appeal from:	H.M. High Court of Tanganyika–Mosdell, J

[1] *Guarantee – Appeal – Price payable by principal debtor by agreed monthly instalments – Acceptance of instalments of less amount than agreed – No consent by surety – Whether performance of terms of contract varied – Whether surety discharged – Indian Contract Act, 1872, s. 133, s. 134, s. 135, s. 137 and s. 139 – Eastern African Court of Appeal Rules, 1954, r. 62, r. 63, r. 77 – Indian Code of Civil Procedure, 1908, O. 13, r. 4 (1).*

[2] *Practice – Appeal – New point of law taken on appeal – Point founded on statute law – New point not pleaded – Minds of parties not directed to issue at trial – Whether permissible to take new point of law on appeal.*

Editor's Summary

The appellant sued the respondent and one, Said Mbarak, in the district court at Dar-es-Salaam for Shs. 10,123/95. The suit arose from an agreement between the three parties, by which, *inter alia*, Said Mbarak undertook to pay the appellant Shs. 12,923/95 by monthly instalments for which the respondent became surety. The agreement also provided that if Said Mbarak defaulted in payment of any instalment the whole balance was to become due and payable. A default occurred and when the appellant sued the respondent by his defence claimed that the appellant had varied the original agreement without his consent by giving Said Mbarak time to pay the instalments and that therefore he was discharged from his liability. The magistrate found that although the monthly instalments had not been paid in full there had been no variation of the agreement and gave judgment for the appellant for the amount claimed. On appeal, to the High Court, the respondent contended, *inter alia*, that the magistrate had erred in holding that there was no variation of the contract of guarantee. The High Court after hearing evidence held that the appellant's acceptance of lesser instalments increased the respondent's liability beyond what he had

undertaken and that under s. 139 of the Indian Contract Act he was discharged from his liability under the agreement, and that the appellant's failure to take action under the provision to cl. 2 of the agreement diminished the respondent's remedies against the principal debtor. The appellants appealed against these findings and contended that the conduct of the appellant amounted to no more than forbearance which, by reason of s. 137 of the Indian Contract Act did not operate to discharge the respondent and that the appellate judge had erred in deciding the appeal on the provisions of s. 139 when the facts necessary to support a discharge under this section were not pleaded. Section 139 of the Act provides that if the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Held –

- (i) the respondent had pleaded no facts whatever which could support a defence under s. 139 of the Indian Contract Act and the minds of the parties were not directed to this issue which, apparently, was raised by counsel for the respondent for the first time in his reply at the end of the hearing of the first

appeal; therefore, the High Court ought not to have allowed this issue to be raised or to have decided the appeal on it.

- (ii) failure to sue in pursuance of the proviso to cl. 2 of the agreement amounted to no more than forbearance to sue within section 137 *ibid.*, and did not constitute a breach of duty to the respondent as surety; in any case, the proposition that by such forbearance the surety's remedy was diminished was an assumption unsupported by evidence and the appellate judge was wrong in holding that on the facts available the matter fell within s. 139.
- (iii) the subsequent acceptance of sums tendered by Said Mbarak without any surrender of his rights by the appellant did not constitute a variation in the performance of the agreement.

Appeal allowed. Judgment and decree of the High Court set aside. Decree of the trial magistrate restored.

Cases referred to:

- (1) *Holme v. Brunskill* (1878), 3 Q.B.D. 495.
- (2) *Perkowski v. City of Wellington Corporation*, [1958] 3 All E.R. 368.
- (3) *Esso Petroleum Co. Ltd. v. Southport Corporation*, [1956] A.C. 218; [1955] 3 All E.R. 864.
- (4) *Pratapsing Moholalbai v. Keshavlal Harilal Setalwad* (1934), 62 I.A. 23.
- (5) *Kali Charan v. Abdul Rahman and Others* (1918), A.I.R. P.C. 226.
- (6) *The Uganda Commercial Co. (Kampala) Ltd. v. Jamal Din Uppal* (1932), 14 K.L.R. 19.
- (7) *Sadik Hussain Khan v. Hashim Ali Khan and Others* (1916), 43 I.A. 212.
- (8) *Mohamed bin Salim El-Jahazmi v. Khoja Tarmohamed Fakir Mohamed* (1928), 11 K.L.R. 39.

December 1. The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes V-P: The appellant sued the respondent and one Said Mbarak bin Valit (to whom I will refer as "the second defendant") in the district court at Dar-es-Salaam for Shs. 10,123/95, together with interest and costs. The suit was based on an agreement dated November 5, 1958, between the appellant, the respondent and the second defendant, the second defendant being sued as principal debtor and the respondent as surety. Judgment as prayed was entered for the appellant in default of appearance by the respondent and the second defendant, but such judgment was subsequently set aside so far as the respondent was concerned. The suit accordingly proceeded to hearing against the respondent alone. On March 31, 1961, the learned resident magistrate gave judgment against the respondent for the amount claimed and costs. A counterclaim, claiming a declaration and injunction, which had been filed by the respondent was dismissed with costs. The respondent appealed to the High Court against the learned magistrate's decision. This appeal does not appear to have extended to the dismissal of the counterclaim. The appeal to the High Court was allowed on August 16, 1961, with costs in the High Court and the district court. The appellant now appeals to this court against the decision of the High Court. The decision of the High Court is silent as to the counterclaim, and that matter has not been raised on the

appeal to this court.

The agreement on which the appellant's claim is based reads as follows:

"An agreement made the 5th day of November, 1958, between Alwi Abdulrehman Saggaf of the one part (hereinafter called the first party) and Abed Ali Algeredi of the second part (hereinafter called the second

party) and Said Mbarak bin Valit of the third part (hereinafter called the third party).

“Whereas a sum of shillings twelve thousand nine hundred twenty three and cents ninety five (Shs. 12,923/95) is owing to the first party by the second party and the second party is the owner of a hotel business, furniture, refrigerator and crockery situated at twenty-six, Mzimbasi Street, Dar-es-Salaam and the third party has agreed to purchase the said hotel business, furniture, refrigerator and crockery from the second party for Shs. 12,923/95.

“Whereby it is agreed as follows:

“(1) In consideration of Shs. 12,923/95 owing to the first party by the second party, the second party as beneficial owner assigns *all that* the said purchase price of furniture, crockery, refrigerator and goodwill of the hotel business or sum of Shs. 12,923/95 due and owing to the second party by the third party as aforesaid *to hold* the same unto the first party absolutely.

“The said purchase price of Shs. 12,923/95 is payable by the third party by instalments of Shs. 500/- per month commencing on November 30, 1958, and thereafter on the last day of every month.

“(2) The third party admits that Shs. 12,923/95 is owing to the second party by the third party in respect of the purchase price of the furniture, refrigerator, crockery and goodwill of the hotel business. The third party agrees to pay the said purchase price in accordance with the assignment aforesaid to the first party by instalments of Shs. 500/- per month commencing on November 30, 1958, and thereafter payable on the last day of every month.

“Provided that in the event of failure of the third party to pay any instalment within seven days from the date on which it is due the total balance of the said sum shall immediately become due and payable.

“Unless the third party pays all such instalments due the first party may call for the transfer of the said hotel business, furniture, refrigerator and crockery of the hotel in consideration of the instalments unpaid by the third party.

“(3) The third party also covenants with the first party to execute a chattels transfer of the furniture, refrigerator and crockery lying in the hotel in favour of the first party as security for due payment of the purchase price assigned by the second party to the benefit of the first party.

“(4) In consideration of the premises the second party hereby guarantees the payment by the third party of the said sum of Shs. 12,923/95 in the manner aforesaid.”

In pursuance of this agreement the second defendant made payments from time to time to the appellant which totalled Shs. 2,800/-. There was a conflict of evidence as to the instalments by which this amount was paid, but not as to the total. The second defendant, who was a witness at the trial, alleged that he had paid three monthly instalments of Shs. 500/- each, then one instalment of Shs. 400/-, and then three instalments of Shs. 300/- each. The appellant, whose evidence was accepted by the learned magistrate, alleged the payments were as follows:

2.12.58	Shs. 500/-
5.1.59	Shs. 500/-
5.2.59	Shs. 300/-
1.3.59	Shs. 300/-

17.5.59	Shs. 300/-
16.5.59	Shs. 300/-
16.7.59	Shs. 300/-
17.8.59	Shs. 300/-

For the purposes of the appeal it is immaterial which is the correct version, and I will assume that payments were made as alleged by the appellant. On either version the last payment was on August 17, 1959. On September 24, 1959, the appellant consulted his advocate. After some correspondence the suit was filed on December 3, 1959.

In the plaint it was pleaded:

- “3. On or about November 2, 1958, the first defendant sold to the second defendant for the sum of Shs. 12,923/95 a hotel business in Dar-es-Salaam. By reason of the said sale the second defendant was, on the 5th day of November, 1958, indebted to the first defendant in the said sum, namely Shs. 12,923/95.
- “4. By an agreement in writing made on the said 5th day of November, 1958 at Dar-es-Salaam between the parties hereto, the first defendant absolutely assigned to the plaintiff the said debt of Shs. 12,923/95 and a written notice of the assignment was duly given by the plaintiff to the second defendant. The said agreement is annexed hereto and marked ‘A’. By the terms thereof the second defendant undertook to pay the said sum of Shs. 12,923/95 to the plaintiff by instalments of Shs. 500/- per month commencing on November 30, 1958, and thereafter payable on the last day of every month. It was further provided by the said agreement that in the event of failure by the second defendant to pay any of the said instalments within seven days of the due date, the whole amount outstanding would immediately become due and payable.
- “5. It was a further term of the said agreement that the first defendant agreed to guarantee the payment by the second defendant as aforesaid.
- “6. In breach of the said agreement the second defendant failed to pay the instalments as and when they fell due, or within seven days of the respective due dates, and in consequence the sum of Shs. 12,923/95, less the sum of Shs. 2,800/- paid by the second defendant from time to time, is now due and owing to the plaintiff.”

The written statement of defence raised, in the first place, the defence of non est factum. This was rejected by the learned magistrate and by the High Court, the learned judge saying:

“I see no ground for upsetting the finding of the learned resident magistrate that the appellant [i.e. the present respondent] knew full well the contents and meaning of the agreement which he signed, and that he was guaranteeing the payment to the respondent by the second defendant of the instalments referred to in the agreement.”

This aspect of the matter does not arise on the appeal to this court, and it is not necessary to set out the parts of the written statement of defence which relate to it.

The only other defence raised in the written statement of defence is in para. 5, which reads:

- “5. In the alternative to para. 4 of this written statement of defence, and without prejudice thereto, this defendant states that if, which is denied, he agreed to guarantee the payment by the second defendant to the plaintiff

of the sum of Shs. 12,923/95, he has been discharged from liability under such guarantee because:

- (a) the plaintiff without any notice to, or consent by, this defendant varied the contract between the second defendant and the plaintiff by giving the second defendant time to pay instalments of the said sum which had become due for payment by the second defendant to the plaintiff under the terms of the said alleged agreement and
- (b) there was a misrepresentation by the plaintiff, or a misrepresentation made on his behalf and with his knowledge and assent, as to the true contents of the said alleged agreement.”

Sub-paragraph (b) of para. 5 can be ignored as it was abandoned in the district court.

Paragraph 4 of the reply and defence to the counter-claim reads:

- “4. The plaintiff denies para. 5 of the defence. The plaintiff did not vary the said agreement in any manner whatsoever and did not give time to the second defendant to pay instalments.”

At the commencement of the hearing issues were settled as follows:

- “1. Did first defendant guarantee the payment of Shs. 12,923/95 by second defendant?
- “2. If so, is such guarantee discharged by variation of the contract as alleged in para. 5 (a) of the written statement of defence?”

As indicated above, the finding on the first issue was in favour of the appellant, and it does not arise on the appeal.

On the second issue the learned magistrate’s findings of fact were as follows:

“It remains my duty to make a finding of fact on the evidence relating to issue No. 2. The plaintiff says that at no time did he agree to a reduction of the second defendant’s monthly instalments and that on each occasion when the second defendant paid a lesser sum than the amount stipulated he said that he would try to pay the balance by the end of the month. The last payment was made on August 17, 1959. On September 24, the plaintiff instructed Mr. Kanji to act in the recovery of the agreed instalments and as a result of these instructions the plaint in this case was filed. I have through-out regarded his as the most cogent evidence in support of the plaintiff’s evidence and I still do. Mr. Lockhart-Smith said he did not know why the plaintiff had changed his mind and did not care. With respect there was very little else to say for an advocate who is not accustomed to making worthless and time-wasting submissions.

“It will therefore be clear by now that I prefer the plaintiff’s evidence on this point to that of the second defendant, but, as Mr. Murray pointed out, even if I had accepted the second defendant’s evidence, it does not disclose a binding contract between him and the plaintiff. I quote Mr. Murray’s last words in the case ‘Even on the second defendant’s own evidence he merely accepted the money. Nothing was said about variation’.”

The learned magistrate then referred to s. 133 s. 134, and s. 135 of the Indian Contract Act (which was in force in Tanganyika at the relevant time) and to authorities cited to him, in particular a passage from the judgment of Cotton, L.J., in *Holme v. Brunskill* (1) (1878), 3 Q.B.D. 495, and continued:

“This statement . . . demonstrated once again that the discharge of the surety derives from an ‘agreement’ between the creditor and the principal debtor. I hold that there was no such agreement or contract in this case. What there was (was?) acquiescence by the plaintiff in the supplications

of a ready (needy?) debtor who was saying, and saying nothing more:

‘I can’t pay you the whole amount today. I shall try to bring the balance by the end of the month’.”

It is convenient here to set out the sections of the Indian Contract Act which are relevant to this appeal. These are s. 133, s. 137 and s. 139, which read as follows:

“133. Any variance made without the surety’s consent in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.”

“137. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.”

“139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.”

Section 134 and s. 135 of the Contract Act may be mentioned, though they do not arise on the appeal in view of the findings of fact of the courts below. They read as follows:

“134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.”

“135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor discharges the surety, unless the surety assents to such contract.”

The learned magistrate said, *inter alia*:

“I agree . . . that no contract between the plaintiff and second defendant can be collected from the payment of smaller instalments and the conversations between them relating thereto”;

and he reached the conclusion which I have already set out that there was in fact no such agreement or contract in this case. The learned judge of the High Court said, after examining the evidence:

“There certainly does not seem to have been any contract between the respondent and the second defendant by which the former promised to give time to or not to sue the latter, which would give grounds for invoking the provisions of s. 135 of the Indian Contract Act.”

It was not contended in the High Court that s. 134 applied.

Four grounds of appeal were argued on the appeal to the High Court, and three of these were determined in favour of the present appellant. Of these, two are no longer in issue. One, which relates to the signing of exhibits, is raised in a notice of cross-appeal filed by the respondent. I will deal with this later. The remaining ground which was argued in the High Court arose on ground 4 of the memorandum of appeal to the High Court, which is as follows:

“4. That the learned resident magistrate erred in holding that there is no variation of the contract of guarantee.”

As to this, the learned judge said:

“I now pass to the third ground of appeal argued by Mr. Chaddah, which

is of some substance and not without difficulty, namely that by reason of variation of the contract as contained in the agreement, agreed to by the respondent and the second defendant without the appellant's consent, the appellant was discharged from his suretyship. This ground of appeal is based firstly on s. 133 of the Indian Contract Act."

The learned judge then set out the terms of s. 133 of the Contract Act and, after reviewing the evidence and reaching the conclusion set out above that

"there does not seem to have been any contract . . . to give time or, not to sue . . . which would give grounds for invoking . . . s. 135 of the Indian Contract Act",

and setting out that section of the Act, continued:

"It is alleged by the respondent that what occurred in the instant case as between himself and the second defendant was that there was mere forbearance on his part, which would not operate to discharge the surety in accordance with s. 137 of the Indian Contract Act."

He then set out s. 137 of the Contract Act and continued:

"Was there a variance of the terms of the agreement made between the respondent and the second defendant without the consent of the surety, or was there mere forbearance on the part of the respondent not to sue or to enforce any other remedy against the second defendant which, in accordance with the terms of s. 137 of the Indian Contract Act, would not discharge the surety? It is clear that what occurred as between the respondent and the second defendant occurred without the appellant's consent. It is submitted by the appellant that by his course of conduct between February 8, 1959, and August 17, 1959, in accepting smaller instalments than those due under the agreement, the respondent impliedly if not expressly agreed to a variance of the terms of the agreement, and that this variance, having been made without the consent of the surety, operated under s. 133 of the Indian Contract Act to discharge the latter from his liability under the agreement. It is submitted on behalf of the respondent that he did no more than accept the lesser instalments when they were proffered by the second defendant, and that his action in so doing fell far short of amounting to a variance of the terms of the agreement; and indeed, as an indication that his actions amounted to a mere temporary forbearance on his part was the fact that as a result of his instructions to Mr. Kanji on September 24, 1959, two days later the latter wrote a letter to the appellant requiring him to fulfil his promise of guarantee contained in the agreement, and that unless the sum of Shs. 10,123/95 was received within ten days legal proceedings would be instituted against him. But I think s. 139 of the Indian Contract Act is more relevant to the facts of the instant case. Mr. Chaddah also sought to rely on s. 139 of the Indian Contract Act."

After setting out s. 139 of the Contract Act, the learned judge continued:

"He referred to the case of *The Uganda Commercial Co. (Kampala) Ltd. v. Jamal Din Uppal*, 14 K.L.R. 19, a 1932 E.A.C.A. case. The dividing line between variance under s. 133—forbearance under s. 137—and inconsistency under s. 139 of the Indian Contract Act is indeed a very narrow one. The authorities indicate that the terms of the contract between the creditor and principal debtor must be meticulously adhered to and that any action taken by the creditor without the surety's consent which injuriously affects the rights of the surety discharges the latter from his liability.

“The matter is thus put in Pollock and Mulla, Indian Contract and Specific Relief Acts (8th Edn.), p. 544:

‘Observe that the injurious quality to be considered is tendency to diminish the surety’s remedy or increase his liability. Transactions having an immediate tendency to cause or permit the principal debtor to make default are only one species of those to which the surety may object. In almost every case where the surety has been released either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety, and the answer has always been that the surety himself was the proper judge of that, and that no arrangement different from that contained in his contract is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is whether what has been done lessens that security’. Per Lord Langdale in *Calvert v. London Dock Co.*, 2 Keen at p. 644.”

Now follows the passage which is challenged on the appeal:

“In the instant case—did the actions of the creditor (the respondent) in accepting lesser instalments than those stipulated in the agreement, and moreover in not taking advantage of the proviso to cl. 2 thereof, diminish the surety’s remedy or increase his liability? By the creditor’s acceptance of lesser instalments the surety’s liability was certainly increased, and surely by the creditor’s failure to take action under the said proviso the surety’s remedy was diminished? The facts in the instant case are similar to those in *The Uganda Commercial Co. (Kampala) Ltd. v. Jamal Din Uppal* cited above, which appears to have been decided on s. 133 of the Indian Contract Act though counsel for the respondent therein relied on s. 139 *ibid*, as well.”

The grounds of appeal in relation to this passage are as follows:

“1. The learned judge erred in holding that the provisions of s. 139 of the Indian Contract Act operated to discharge the respondent from his obligations to the appellant as a surety under the agreement of November 5, 1958. In particular the learned judge erred in holding:

- (a) that by the appellant’s acceptance of lesser instalments the respondent’s liability was increased beyond the liability undertaken in the said agreement, and;
- (b) that the appellant’s failure to take action under the provision to cl. 2 of the said agreement diminished the surety’s remedies against the principal debtor.

“The learned judge should have held, in considering s. 139 of the Indian Contract Act:

- (i) that the conduct of the appellant amounted to no more than forbearance which by reason of the provisions of s. 137 did not operate to discharge the respondent;
- (ii) that no act of the appellant was inconsistent with the rights of the respondent;
- (iii) that the appellant had not omitted to do any act which his duty to the respondent required him to do;
- (iv) that the respondent’s eventual remedy was in no way impaired, and should have dismissed the appeal.”

A further ground of appeal relates to the propriety of the learned judge

deciding the appeal on s. 139 of the Contract Act. As to this, the learned judge said:

“I have considered whether it is proper of me to consider s. 139 of the Indian Contract Act in this appeal as it was not pleaded as a defence in the court below. I have decided that it is proper for me so to do. The construction of s. 139 *ibid.* is a question of law and the facts upon which the decision *qua* s. 139 depends were fully given in evidence in the court below—albeit in connection with other sections of the Indian Contract Act. Nevertheless, the dealings between the creditor of the principal debtor *qua* the Indian Contract Act were matters of fact fully dealt with in evidence in the court below and it cannot be stated, I think, that the trial would have assumed a different character had s. 139 *ibid.* been specifically pleaded as a defence.”

The relevant ground of appeal is as follows:

“2. The learned judge erred in deciding the appeal on the provisions of s. 139 of the Indian Contract Act when the facts necessary to support a discharge under this section were not pleaded (nor was this ground made a ground of appeal). In particular the pleadings did not aver:

- (a) the commission by the appellant of any act inconsistent with the rights of the surety, or;
- (b) the omission of any act which the appellant’s duty to the respondent required him to do, or;
- (c) that the remedy of the respondent against the principal debtor was impaired.

“In consequence the minds of the parties were not directed at any stage of the proceedings to the issues of fact as aforesaid which were prerequisites to a discharge of the respondent under the provisions of s. 139 of the Indian Contract Act.”

I will deal first with the second ground of appeal, and also with an issue raised in argument by Mr. Chaddah for the respondent, as similar considerations apply to both.

The circumstances in which a point of law which has not been argued in the court below may be taken on appeal were considered by the Privy Council in *Perkowski v. City of Wellington Corporation* (2), [1958] 3 All E.R. 368. This was an appeal from a decision of the Court of Appeal of New Zealand. The facts of the case are not material, but the appellant there sought to base her case both before the Court of Appeal of New Zealand and before the Privy Council on a submission which had not been made at the trial. The Court of Appeal of New Zealand decided that, the point not having been taken at the trial, it could not be taken on appeal. Their lordships of the Privy Council said (at p. 373 of the report):

“In *Connecticut Fire Insurance Co. v. Kavanagh*, [1892] A.C. 473, Lord Watson, in delivering the judgment of their Lordships’ Board, after referring to the raising of points of law in an appellate court on facts admitted and proved beyond controversy said (*ibid.*, at p. 480):

‘But their lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.’

A similar statement will be found in Lord Herschell’s speech in *Tasmania (Ship Owners & Freight Owners) v. Smith etc., City of Corinth (Owners)*.

The Tasmania (1890), 15 App. Cas. 223 at p. 225.

“In an appeal in a case tried with a jury, the appellate court must also consider whether further questions would have been left to the jury, their answers to which remain uncertain. Apart from this principle, the matter is one of discretion for the appellate court, and their lordships would be loth to interfere with the discretion as exercised by the Court of Appeal in the present case.

“There is a further consideration referred to by Lord Birkenhead, L.C., in *North Staffordshire Railway Co. v. Edge*, [1920] A.C. 254 at p. 263:

‘The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of appellate tribunals to require that the judgments of the judges in the courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.’

These observations should be read subject to the qualification stated in the speeches of Lord Atkinson and Lord Buckmaster in the same case, but they appear to their lordships to apply with great force to the present appeal. For it is clear that points which would have plainly arisen if this point had been taken remain in doubt.”

On the question of pleadings, in *Esso Petroleum Co. Ltd. v. Southport Corporation* (3), [1956] A.C. 218 at p. 238, Lord Normand said:

“The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them . . . To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.”

In the instant case no facts whatever were pleaded by the respondent which would support a defence under s. 139 of the Contract Act. The only facts pleaded in relation to the Contract Act are those in para. 5 (a) of the written statement of defence, which is set out above. Neither did the issues settled at the commencement of the hearing hint at such a defence. The learned judge said

“the facts upon which the decision qua s. 139 depends were fully given in evidence in the court below . . . it cannot be stated, I think that the trial would have assumed a different character had s. 139 . . . been specifically pleaded as a defence.”

But, with great respect, is this the case? Two questions of fact arise under s. 139, namely:

- (a) whether the creditor has done any act which is inconsistent with the rights of the surety, or has omitted to do any act which his duty to the surety required him to do; and, if so,
- (b) whether the eventual remedy of the surety himself against the principal debtor was thereby impaired.

It can, perhaps, fairly be said that evidence of the facts relevant to (a) were before the court, but, as regards (b), there has not been any allegation, still less any evidence, that the eventual remedy of the surety against the principal debtor has been impaired. The learned judge has assumed that by the acceptance of

lesser instalments the surety's liability was increased, and that by the failure of the appellant to take action under the proviso to cl. 2 of the agreement the surety's remedy was diminished. I will deal with these propositions in more detail later. But these are assumptions which were never tested at the trial. The minds of the parties simply were not directed to this issue, which, apparently, was raised by counsel for the respondent for the first time in his reply at the end of the hearing of the first appeal. In the circumstances, it appears to me that the appellant had no fair notice of this issue, and that the court cannot be satisfied that the facts, if fully investigated, would have supported the new plea.

In my view, accordingly, the learned judge ought not to have allowed this issue to be raised, or to have decided the appeal on it.

Before us, Mr. Chaddah attempted to found an argument in support of the respondent's case on cl. 3 of the agreement, that is, the covenant by the second defendant to execute a chattels transfer of furniture, etc. in favour of the appellant as security for the due payment of the second defendant's debt. It emerged in the course of the evidence that the chattels transfer never had been executed, and Mr. Chaddah contended before us that this was an impairment of the security against the debtor which would discharge the surety. It may be that there is substance in Mr. Chaddah's contention, but, in my opinion, to allow the point to be taken for the first time on second appeal would be grossly unfair to the appellant. The point was never pleaded, was never in issue at the trial, and the relevant facts were never investigated. The written statement of defence was drawn by, and the respondent was represented at the trial by, a counsel of known experience and ability. It is difficult to suppose that he would not have raised so obvious a matter unless he was satisfied there was a good defence to it. However that may be, I think the principles stated in the *Esso Petroleum* case (3), and the *Perkowski* case (2), apply with full force to this plea, and I do not propose to consider it.

The view I have taken of the case on the basis of s. 139 of the Contract Act would, subject to the matter raised on cross-appeal, suffice to decide the appeal in favour of the appellant. However, I will also consider the case on the basis of that section; and also, as it was argued by Mr. Chaddah on the appeal, on the basis of variation of the contract under s. 133 of the Contract Act.

As regards the learned judge's decision on the basis of s. 139, the learned judge stated first that

"by the creditor's acceptance of lesser instalments the surety's liability was certainly increased";

and secondly, that "by the creditor's failure to take action under" the proviso to cl. 2 "the surety's remedy was diminished". Assuming for the moment that the acceptance of the lesser instalments did not result in a variation in the contract which would bring the matter within s. 133, it is, with respect, difficult to see how the surety's liability was so increased or his remedy diminished. Under the terms of the agreement, on the first failure to pay the full instalment, the total balance immediately became due and payable. The appellant could have instituted proceedings forthwith. He did not do so, but neither did he release the second defendant; nor did he by any act or omission discharge the second defendant from the performance of his contract. The learned judge appears to have considered that the failure of the appellant to take action under the proviso to cl. 2 of the agreement was a breach of the appellant's duty to the respondent. But, with respect, the agreement lays no such duty on the appellant. The proviso reads:

"Provided that in the event of failure of the third party to pay any instalment within seven days from the date on which it is due the total balance of the said sum shall immediately become due and payable."

Failure to sue in pursuance of this proviso amounts, in my opinion, to no more than forbearance to sue within s. 137 of the Contract Act, and does not constitute a breach of duty to the surety. In any case the proposition that by such forbearance “the surety’s remedy was diminished” appears to be an assumption unsupported by evidence. As to the proposition that the acceptance of the Shs. 300/- tendered resulted in an increase of the surety’s liability, the respondent’s liability was to pay the whole amount still owing when the first default occurred. Mere forbearance to sue for the time that in fact elapsed would not discharge the surety had no payment whatever been made by the second defendant after the first default. It is difficult to see how the acceptance of money tendered by the debtor increased the liability of the respondent or impaired his eventual remedy when such acceptance did not discharge the second defendant from the performance of his contract. I think, therefore, with respect, that the learned judge was wrong in holding that on the facts available the matter fell within s. 139 of the Contract Act.

Mr. Chaddah argued that the learned judge in fact considered s. 139 with s. 133 and concluded that there had been a variation of the agreement within s. 133; he contended that in fact the acceptance of the lesser amounts by the appellant was a variation of the terms of the agreement by conduct and that the respondent was thereby discharged. Mr. Chaddah conceded that, as found by the learned magistrate, there was no variation of the agreement by an assent to new terms, but, as I understood him, contended that there was a variation in the performance of the terms of the agreement.

I am unable to read into the learned judge’s judgment a finding that the acceptance of the lesser instalments amounted to a variation of the terms of the agreement. The relevant passage in the judgment reads:

“It is submitted on behalf of the respondent that he did no more than accept the lesser instalments when they were proffered by the second defendant, and that his action in so doing fell far short of amounting to a variance of the terms of the agreement; and indeed, as an indication that his actions amounted to a mere temporary forbearance on his part was the fact that as a result of his instructions to Mr. Kanji on September 24, 1959, two days later the latter wrote a letter to the appellant requiring him to fulfil his promise of guarantee contained in the agreement, and that unless the sum of Shs. 10,123/95 was received within ten days legal proceedings would be instituted against him. But I think s. 139 of the Indian Contract Act is more relevant to the facts of the instant case.”

While it is not entirely clear, I read this as a rejection of the proposition that acceptance of the lesser amounts resulted in a variation in the terms of the agreement. It certainly is not a finding that there was a variation in the terms of the agreement.

However, apart from this, it appears to me that what was done in this case did not amount to a variation in the performance of the terms of the agreement. The distinction between variation in the terms of a contract by agreement of the parties, and variation in the performance of a contract was stressed in *Pratapsing Moholalbai v. Keshavlal Harilal Setalwad* (4) (1934), 62 I.A. 23, where at p. 33 Lord Atkin said:

“It appears to their lordships that the law on the discharge of sureties has been somewhat obscured by the emphasis laid in the case on an agreement between the parties to vary the terms of the original agreement. The principle is that the surety, like any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract no further question arises. The original contract has gone, and unless the surety

assented to the new terms, there is nothing to which he can be bound, for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed. Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place. In the vast majority of cases a different performance of the original contract is due to an express variation of the terms between the parties; and it is natural that the reported cases should mainly deal with this situation. But it is important that the underlying principle should not be obscured.

“A good illustration of the essential rule is afforded by the case of *Blest v. Brown* (1862), 4 De G. F. & J. 367, 376. In that case the surety had guaranteed the payments by a baker to the flour merchant for flour to be delivered to the baker for the purpose of baking bread that he supplied for army requirements. The flour was to be of specified quality. The merchant delivered flour which was not of the contract description. The surety commenced a suit in Chancery to have it declared that the surety bond was void in equity by reason of misrepresentations and ‘by reason of the conduct of the parties’. After dealing with the case based upon misrepresentation, the Lord Chancellor, Lord Westbury, proceeded as follows:

“ ‘It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say “The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore is at an end.” Now I construe this engagement to be an engagement to be answerable for flour supplied in conformity with the requisitions of this contract. Then I ask de facto was any flour supplied to Millar in conformity with the requisitions of the contract? The answer of the defendants themselves is an admission that none such was supplied. The conclusion is plain, therefore, that no legal obligation, so far as the surety is concerned, arises upon what has been done under this contract so construed, as I hold it ought to be construed, and as involving the representation that I have stated.’ ”

Has there been any such variation of performance here? It appears to me that there has not. As I see the matter, the position here was that on the first default in payment of the full instalment the whole amount of the debt became due and payable. The appellant did not immediately seek to enforce payment of the whole debt, but it is accepted that he did not release the second defendant and that his acts did not discharge the second defendant from the performance of the contract. The breach of a contract is not a variation of it. The appellant did not surrender any of his rights under the agreement. Had there been no payment made by the second defendant after the first default, there could be little doubt that the delay in suing would be no more than “mere forbearance”. It does not seem to me that the subsequent acceptance of sums tendered by the second defendant without any surrender of his rights by the appellant constitutes a variation in the performance of the agreement.

It appears to me that the facts in this case bear a strong resemblance to the essential facts in *Kali Charan v. Abdul Rahman and Others* (5) (1918), A.I.R. P.C. 226. I take the following statement of the facts in that case from the judgment of the Privy Council delivered by Sir John Edge:

“The plaintiff in this suit, who is a zamindar, in May, 1902, contracted by lease to sell to Muhammad Amanatullah Khan, who will be referred to as defendant No. 1, trees growing in Mauza Gulavhai to be cut and removed by the defendant No. 1. A dispute having arisen between the plaintiff and the defendant No. 1 the latter brought against the plaintiff a suit for specific performance of the contract, which on January 9, 1909, resulted in a compromise in accordance with which the suit for specific performance was decreed. In pursuance of the compromise the defendant No. 1 on January 14, 1909, executed a deed of agreement by which he covenanted with the plaintiff that he would abide by all the conditions as entered in the lease and would furnish in zamindari property sufficient security for the performance by him of the conditions entered in the deed of agreement. By one of those conditions the defendant No. 1 bound himself to deposit in court within one month for payment to the plaintiff Rs. 6,000, less certain earnest money previously paid, and to pay to the plaintiff the balance of Rs. 18,000 of the purchase money by six half-yearly instalments of Rs. 3,000 each beginning on February 10, 1910, and agreed that,

‘in the event of default in the payment of any instalment or of my giving up the forest the zamindar (the plaintiff in this suit) aforesaid shall be at liberty to rescind the stipulation to pay by instalments and realise all the instalments remaining due in a lump sum with interest at the rate of rupees six Rs. 6 per thousand per mensem from the date of the instalments falling into arrears from the person and property of me and the surety through the court . . .’

“That deed of agreement was registered on January 22, 1909.

“On February 27, 1909, the defendants Abdul Rahman Khan, Asad Ali Khan, Raushan Ali Khan and Rajab Ali Khan, executed a surety bond in favour of the plaintiff by which, after reciting that the defendant No. 1 had taken the lease for cutting trees in Mouza Gulavhai from the plaintiff:

‘For a sum of Rs. 24,000 (twenty-four thousand) as entered in the registered agreement dated January 14, 1909, in which all the conditions of the lease are entered and which we have read and thoroughly understand,’

they agreed that:

‘We do hereby stand surety for the said Muhammad Amantullah Khan (the defendant No. 1) in the sum of Rs. 18,000 (eighteen thousand) and covenant that the lessee aforesaid shall act up to all the conditions contained in the said lease-agreement, and that if there be any breach of contract on his part and the zamindar (the plaintiff) is put to any loss, or if the lessee does not pay the lease money or any part thereof, then we shall pay the same ourselves from our own pocket, and we, the sureties, shall be responsible for the losses and damage that may be sustained by him (the zamindar). And as security for payment of the “money as well as for losses and damages, etc., we do hereby hypothecate our zamindari property specified below which is heretofore free and immune from all liens, and if it be found subject to any lien, then we, the sureties, will be responsible therefore. And the lessor (the plaintiff) shall have power to realise the balance of his lease money in any manner he likes from us and the property under mortgage; we shall have no objection whatever.’

“That surety bond was registered on March 3, 1909.

“After the Rs. 6,000 had been deposited and the first two instalments had been partly paid the rights and interest of the defendant No. 1 under the lease were sold in execution of a decree for money which had been obtained by Lal Mangal Sen and others, and were purchased by Habib-ur Rahman

Khan, and default was made by defendant No. 1 in paying any part of the balance due of the Rs. 18,000 and that balance has remained unpaid. The suit in which this appeal has arisen was brought . . . on September 23, 1912, and the relief sought against the defendant No. 1 and the sureties was a decree for Rs. 11,514 as principal moneys remaining unpaid of the instalment, . . . interest . . . and damages . . .”.

It is to be noted that the instalments were only partly paid. Their lordships commented, in relation to the original trial:

“The sureties by their written statement alleged that the surety bond was without consideration; that they were not sureties for the purchaser at the execution sale: and that the plaintiff did not enforce the conditions of the agreement on non-payment of the first instalment. This was an idle defence. There was ample consideration for the bond; anything done, or any promise made for the benefit of the principal, may be a sufficient consideration to a surety for giving a guarantee; the liability of the sureties was for the performance by the defendant No. 1 of the conditions of the lease which were set out in the deed of agreement of January 14, 1909, and the plaintiff was not bound on the failure of the defendant No. 1 to pay an instalment when it became due to insist on the payment by the defendant No. 1 of all the other instalments.”

I have already pointed out that in the instant case the appellant was not bound, on the failure of the second defendant to pay an instalment, to insist on the payment of all the other instalments. Their lordships proceeded to deal with the ground on which the appeal to the High Court had been allowed (which is not relevant to this appeal) and continued:

“There is nothing in the grounds of the appeal of the sureties to the High Court to suggest that the plaintiff was suing the sureties for any acts committed by the man who had purchased at the sale under the decree for money the rights of the defendant No. 1. That sale had not the effect of releasing the defendant No. 1 or his sureties from liability to perform the covenants and conditions of the lease and the deed of agreement of January 14, 1909. The plaintiff had not made any variance in the terms of the contract between him and the defendant No. 1 which would discharge the securities (sic): he had not released the defendant No. 1; nor had he by any act or omission discharged the defendant No. 1 from the performance of the contract; nor had he done any act which was inconsistent with the rights of the sureties; nor had he omitted to do any act which his duty to the sureties required him to do. Mere forbearance on the part of a creditor to sue the principal debtor or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety. The sureties were not in this case discharged from their liability under the surety bond.”

It appears to me that their lordships’ remarks in this passage fully apply to the instant case.

I have set out the *Kali Charan* case (5) at some length because Mr. Chaddah relied strongly on a decision of this court in *The Uganda Commercial Co. (Kampala) Ltd. v. Jamal Din Uppal* (6) (1932), 14 K.L.R. 19, where it was apparently held that acquiescence in the irregular payment of instalments by a creditor amounted to a variation of the contract and discharged the surety. In so doing the court was upholding a finding of fact by the lower court that there had been a variation in the contract. It may be that the facts, which do not appear fully in the report, justified this conclusion. If the court purported to hold that mere forbearance to sue on a failure of the debtor to pay the

full amount of one or more instalments amounted to a variation of the contract, I must respectfully differ from the decision of the learned judges. *Kali Charan v. Abdul Rahman* (5), was not apparently considered by the court on that occasion. I cannot think that the court would have reached such a conclusion if the *Kali Charan* case (5), had been before it. I think it possible that the *Commercial Co.* case, could be distinguished on the facts if these were fully known but, if it cannot, I would hold that the decision was reached, per incuriam, in ignorance of the decision of the Privy Council in the *Kali Charan* case (5), and so not binding on the court in so far as it could be taken to be an authority for the proposition that mere neglect to take action on failure of a debtor to pay the full amount of instalments constitutes a variation of the contract.

I turn now to the cross-appeal; but before dealing with it I would mention a “preliminary objection” that Mr. Chaddah attempted to raise at the hearing of the appeal. He drew attention to r. 62 of the Eastern African Court of Appeal Rules, 1954, which relates to the matters to be included in the record of an appeal, and, in particular, to para. (c) of sub-r. (4) which refers to the inclusion in the record of copies of exhibits, and endeavoured to argue, as I understood him, that the appeal was incompetent because translations of certain Urdu receipts which had been produced in the district court were not included in the record. The rule requires only that copies of exhibits be included “so far as they are material for the purposes of the appeal”. The receipts in question were quite immaterial to the matters raised on the appeal, their contents being in any case stated in the learned judge’s judgment. We considered that the point taken as a ground for dismissing the appeal was entirely frivolous, and pointed out to Mr. Chaddah that if he considered the record was defective his proper course was to file a supplementary record in accordance with r. 63 of the Rules.

The point taken in the cross-appeal is purely technical. Order 13, r. 4 (1), of the Civil Procedure Rules as in force in Tanganyika provides:

“4.(1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted; and the endorsement shall be signed by the judge.”

Sub-rule (2) is not material. The learned magistrate in the instant case omitted to mark and sign the exhibits as required by this rule, and Mr. Chaddah took the preliminary objection on the appeal to the High Court that that court consequently could not look at the exhibits. He relied on *Sadik Husain Khan v. Hashim Ali Khan and Others* (7) (1916), 43 I.A. 212, and the decision of this court in *Mohamed bin Salim El-Jehazmi v. Khoja Tarmohamed Fakir Mohamed* (8) (1928), 11 K.L.R. 39. The learned judge dealt with the objection by remitting the record to the district court for the exhibits to be marked as required by O. 13, r. 4. Mr. Chaddah now contends that it was incompetent for the learned judge to remit the record, or for the learned magistrate to mark the exhibits at that stage in proceedings. In his notice of cross-appeal Mr. Chaddah asks that, on the basis of this contention, the appeal should be dismissed and the judgment of the High Court should be allowed to stand. This seems something of a non sequitur, since, if the learned judge reached a conclusion favourable to the respondent on the basis of an improper view of the exhibits, it is difficult to see how that conclusion is to be sustained because the view was improper. Mr. Chaddah’s objection, if successful, could only result in an order for re-trial and a throwing away of all costs incurred up to this stage.

The passage in *Mohamed bin Salim's* case (8), on which Mr. Chaddah relies is as follows:

“Upon the appeal coming before this court Mr. Gulamali raised the preliminary objection that this account had not been endorsed as an exhibit by the trial judge, as is required by the Civil Procedure Decree, 1917, O.XIII, r. iv (2).

.....

“Mr. Gulamali submitted that as there was no endorsement signed or initialled by the judge, this court could not peruse the document.

“The case of *Sadik Khan v. Hashim Khan* (1916), 43 All India Rep. 27, was referred to. In that case, at p. 41, the Privy Council laid down that the court would in order to prevent injustice be obliged in future to refuse to read or permit to be used any document not endorsed in the manner required. That case was decided on the provisions of O. XIII, r. iv, of the Indian Civil Procedure Code, the provisions of which, in this respect, are exactly reproduced in the Civil Procedure Decree, 1917. This is a decision which binds this court and accordingly we are compelled to consider this case as though the account had not been admitted by the learned Chief Justice.”

In the Privy Council case referred to it is clear that the Privy Council in fact looked at exhibits which were not marked although there was conflict between the parties as to the identity of the exhibits. The Privy Council then proceeded to lay down the rule of practice referred to in order to prevent injustice in respect of future cases. It is to be noted that the rule is a rule of practice and not a rule of law. I find it difficult to suppose that their lordships of the Privy Council would adhere rigidly to it where to do so would cause manifest injustice, for instance in a case where there was no dispute as to the identity of the exhibits and previous appeals had proceeded without question on the basis of the genuineness of such exhibits. The position, of course, would be very different where the identity of the exhibits was in question. It appears to me that the matter would now fall within r. 77 of the Eastern African Court of Appeal Rules, 1954, which reads as follows:

“77. No judgment, decree or order of a superior court, or of any judge thereof, shall be reversed or substantially varied on appeal, nor a new trial ordered by the court, on account of any error, defect, or irregularity, whether in the decision or otherwise, not affecting the merits, or the jurisdiction of the superior court.”

So far as this court is concerned, I think that, the matter being one of practice, and the decision in *Mohamed bin Salim's* case (8), having been given before r. 77 was in existence, it is competent for the court to relax the strict application of O. 13, r. 4 (1), in cases where no injustice would result, such as in this case where there is no dispute as to the identity of the exhibits. In the instant case the exhibits before this court are in fact marked; and it is not suggested that the wrong documents have been marked as exhibits. It is true that the marking was done after delivery of judgment and at the request of the High Court. It is contended that at that time the magistrate was, *functus officio*, and this is true so far as any judicial function is concerned. The marking of the exhibits, however, is an administrative function, and I have not had my attention drawn to any provision which would preclude its being done after delivery of the judgment. I see no reason why the High Court should not, in its discretion, remit a record to a magistrate for the marking of the exhibits in accordance with O. 13, r. 4, and have regard to the exhibits so marked, where there is no suggestion that the wrong documents have been marked. So far as this court is concerned,

I would hold that even if the marking of the exhibits is irregular, the matter falls within r. 77. In fact, the only exhibit which is material in this case is the agreement, exhibit P. 1, and I think it was competent for the court to have regard to the agreement without its production as an exhibit in view of the pleadings; a copy of the agreement being annexed to the plaint, and the respondent, in para. 4 (c) of the written statement of defence pleading:

“(c) This defendant states that he marked and executed the alleged agreement under a total mistake as to its nature and contents and in the bona fide belief that he was marking and executing an instrument of a wholly different kind.”

This in my view is an admission of the execution of the agreement and of the contents as set out in the annexure to the plaint. Mr. Chaddah raised a question as to whether in such case the court would be in a position to satisfy itself that the agreement was properly stamped. I do not think there is anything in this point. Even if the record were silent, I should be prepared to assume that the learned magistrate, who saw the document, had duly satisfied himself as to the correctness of the stamp; but in fact it is clear from the record that the question of stamp duty was mentioned and that the learned magistrate must have been satisfied that the agreement was correctly stamped.

For the reasons I have given I would allow the appeal with costs here and in the High Court, set aside the judgment and decree of the High Court, and order that the decree of the learned magistrate be restored.

Crawshaw JA: I agree.

Newbold JA: I also agree.

Appeal allowed. Judgment and decree of the High Court set aside. Decree of the trial magistrate restored.

For the appellant/cross-respondent:

WD Fraser Murray

For the respondent/cross-appellant:

MS Chaddah

For the appellant:

Advocates: *Fraser Murray, Thornton & Co*, Dar-es-Salaam

For the respondent:

MS Chaddah, Dar-es-Salaam